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CASES

DECIDED IN

THE HOUSE OF LORDS,

ON

APPEAL FROM THE COURTS OF SCOTLAND.

SESSIONS OF PARLIAMENT 1848—49.

VOL. VI.

REPORTED BY

SYDNEY S. BELL,

OF LINCOLN'S INN, BARRISTER AT LAW.

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Whether a minor or lunatic should, before majority or convalescence elect, by his curator, between his rights at law and his interests under a will, is completely within the power of the Court, and will be exercised for him by the Court, only where it is absolutely necessary, with a view to the interests of other persons. Turnbull *v.* Cowan 222

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1. If the insured having received letters intimating damage to their vessel and the measures taken to repair it keep those letters without communicating their contents to the insurers, and give directions for the reception of the vessel as their own property, they cannot afterwards, on the pretext that they were not fully informed of the nature of the damage sustained and of the extent of the repairs, abandon the vessel, and claim for a total loss.

2. Where a vessel sustains damage, but is capable of being repaired at a cost exceeding her value after the repair, the owners, in order to entitle themselves to claim as for a total loss, must give notice of abandonment within a reasonable time after receiving advice of the damage. *Semble.* Fleming *v.* Smith . . . 278

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2. A party cannot ask interdict to restrain the publication of matter which, by the application for interdict, he himself makes more public than the publication complained of could have done. *Semble.* Fleming *v* Newton 175

INTESTACY.

Where real and personal estate are given to Trustees, with a direction to invest the personal estate in the purchase of lands, and upon the happening of a contingency to entail both the lands given and those to be purchased, upon a specified series of heirs, without any direction as to the application of the rents of either set of lands, until the occurrence of the contingency, these rents will not fall under the direction to invest and entail; but will go to the heir as undisposed of. Turnbull *v.* Cowan . . 222

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3. After an interlocutor remitting a cause to be tried by a jury, the Court of Session, as such, ceases to have jurisdiction to try it under its ordinary powers upon a re-remit—and subsequent proceedings before the Court had by consent of the parties under such a re-remit, are extra-judicial, and such as cannot be the subject of appeal. Craig *v.* Duffus 308

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LEASE.

1. Under an obligation by a tenant not to remove fodder, &c., produced on the lands held by him (hay, &c., "of the *last crop* excepted"), and a renunciation of the tenant's lease, accepted by the landlord fourteen years before its expiration by effluxion of time, the crop of the year in which the renunciation was accepted is to be treated as the "last crop," in construing the restriction upon the tenant as to the removal of fodder, &c. Wemyss *v.* Drysdale . 455
2. Where the covenant by a tenant for removal from a farm under a liferent lease fixes the removal at a period subsequent to the death of the tenant for life, that does not *per se* entitle the representative of the tenant to cultivate the farm during the period between the death and the term for removal, in the absence of anything else to give a title of possession after the death of the tenant for life. Tweeddale *v.* Murray 125

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A lunatic heir entitled, on the occurrence of a contingency, to certain benefits under the will of his ancestor, is entitled in the meanwhile to the undisposed estate of his ancestor, without prejudice to his right to elect, when the contingency shall arise, between his *legitim* and the benefits given by the will. Turnbull *v.* Cowan 222

LIBEL.

1. As all the records are by statute made open to the public, it is not libellous for a body of merchants to publish to each other the names, appearing upon the Register of Protests, of persons who have dishonoured their bills.
2. The decrees of the Courts upon the registration of deeds and protests are equally known to the public, and may be published to it, as decrees pronounced *in foro contentioso*.
3. Whether the Courts have any power to interdict *a priori* the publication of matter alleged to be libellous. *Quære?* Fleming *v.* Newton 175

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MASTER AND SERVANT.

If a schoolmaster holding his appointment *ad vitam aut culpam*, from the Directors of a body of subscribers, on having notice given him of charges intended to be made against his moral character, and being required to attend before the Directors with the view of giving explanation of the matters charged, refuse either to attend or to give any explanation, that is sufficient *culpa* to justify the charges being entertained, and his dismissal being resolved upon in his absence. Weir *v.* Crawfurd 112

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NOVATION.

Where a debtor enters into an arrangement with his creditors, which amounts to a re-constitution of their debts, and a provision for their payment, it is not competent to look to anything anterior to this arrangement as affecting the validity of the original evidence of the debt or the liability of the debt to prescription. Watson *v.* Johnstone 245

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1. The right to sue reduction of a deed as null, in respect of erasures *in substantialibus* apparent *ex facie*, is not cut off by the lapse of 40 years. Grant *v.* Shepherd 153
2. A trust for payment of debts elides the plea of prescription. Watson *v.* Johnstone 245

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See *Trust*, 1.

PROCESS.—6 Geo. IV. c. 120.

1. The proper form of interlocutor to be made by the Court of Session, in reviewing the decree of an inferior Court upon matters of fact proved by commission, where the Court agrees in the result at

PROCESS—*continued.*

which the inferior Court arrived, is not to remit simpliciter, but in terms of the 49th section of the Judicature Act to specify distinctly the facts the Court finds to be established by the proof, and how far the interlocutor proceeds on the facts so found, and the points of law meant to be decided. Wemyss *v.* Wilson . 394

2. Where a party has not complained of a verdict in the manner allowed by the statute, in so far as regards the facts found by it, he cannot, in an appeal of the interlocutor applying the verdict, complain of the verdict as not being an answer to the question raised by the issue. Cleland *v.* Weir 402

PROPERTY.

A proprietor of ground, described by his title as being of a specified extent, and as bounded by the sea-shore, has no right to inclose that part of the shore which is covered by the sea only in ordinary spring-tides, over which the public has been from time immemorial in the habit of passing, and over which he cannot prove any past use or possession by himself. Smith *v.* Officers of State. 487

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REDUCTION.

The act of a Sheriff in awarding expenses upon a higher scale than allowed by statute, is not an excess of jurisdiction to be corrected by reduction, but of judgment to be corrected by appeal. Baillie *v.* Mc Gibbon 260

SALE.

1. If an offer to sell be answered by a letter put into the post-office, the contract of sale is completed, and the purchaser is not answerable for delay in delivery of the letter, arising with the post-office.
2. The question of amount of damage for non-performance of a contract of sale, is not confined to the difference between the contract price and the market price, on or about the day on which the contract was broken, but is to be left to the jury for consideration, upon all the circumstances of the case, of what will best compensate the party. Dunlop *v.* Higgins 195
3. A delivery note "to the order" of the vendee is not such a document as will, by the endorsement of the vendee, transfer a right of property to the transferee and destroy the vendor's lien for the price.
4. Where goods have been deposited in a warehouse by an agent in his own name for his principals, naming them, notice to the agent of a delivery note will not work a transference of possession of the goods to the parties giving the notice, so as to defeat the lien of the vendor for the price. Mc Ewan *v.* Smiths . . . 340

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1. The benefit of a servitude in favour of one urban tenement over another, is not lost to the dominant tenement by the fact of the servitude having been omitted to be inserted in the titles of the servient tenement for a period exceeding forty years.
2. Terms of clause in a charter creating a servitude held not to create it for the personal benefit of the then present owners of another tenement, but for the perpetual benefit of the tenement into whosesoever possession it might come.
3. User, as a painter's shop, of buildings which had been erected in the back area of a dwelling-house, under a restriction not to build on the area any other buildings except stables, coach-houses, and other offices; held not to be such an adverse possession, though continued beyond forty years, as would work off the servitude and entitle the party to erect buildings beyond the limits allowed by the restriction. Inglis *v.* Boswell 427

SCHOOLMASTER. See *Master and Servant.*

SMALL DEBTS ACT.

Review of sentences of the Sheriff under the Small Debt Act, 1 Vict., cap. 41, even upon the ground of want of jurisdiction because of non-residence within the Sheriffdom, is excluded, unless by appeal to the next Circuit Court of Justiciary. Graham *v.* Mackay 214

SOCIETY.

Individual members of a society, who have contributed towards its funds for the accomplishment of a certain public object, are not entitled to have the society dissolved and its property realized and divided among the members upon proof of greater or less improbability of the general object being accomplished—they must shew that the object cannot by possibility be accomplished. Bain *v.* Black 317

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A statute in terms declared to be applicable to all payments within the United Kingdom construed to be applicable to Scotland, though from its matter and the terms of its preamble and certain of its sections it was apparently confined to England. Fordyce *v.* Bridges 1

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CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1847.

[23*rd February*, 1847.]

MRS. JESSY STEWART D. FORDYCE, *Appellant.*

SIR HENRY BRIDGES, of Beddington, KNIGHT, *Respondent.*

Statute.—Apportionment Act, 4 *and* 5 *Will. IV.*, *cap.* 22, *construction of.*

Ibid.—A statute in terms declared to be applicable to all payments within the United Kingdom construed to be applicable to Scotland, though, from its matter and the terms of its preamble and certain of its sections, it was apparently confined to England.

JOHN D. DINGWALL, an heir in possession of entailed lands, died on the 26th October, 1840. The husband of the Appellant, the next heir of entail, forthwith entered to possession of the lands, and drew the rents which accrued for the period subsequent to Whitsunday, 1840. The Respondent, as executor of J. D. Dingwall, brought an action, founded on the Act of 4 and 5 Will. IV., cap. 22, against the Appellant's husband, which, upon his death, was insisted in against her as his executrix, concluding for payment of a proportion of the rents for the period between Whitsunday and Martinmas, 1840,

FORDYCE v. BRIDGES.—23rd February, 1847.

corresponding to the period which J. D. Dingwall had lived beyond Whitsunday, 1840.

The Act of the 11th of George II. is entitled "An Act for the "more effectually securing the payment of rents, and preventing "frauds by tenants." And its preamble is thus expressed:— "Whereas where any lessor or landlord, having only an estate "for life in the lands, tenements, or hereditaments demised, "happens to die before or on the day any rent is reserved, or "made payable, such rent, or any part thereof, is not by law "recoverable by the executors or administrators of such lessor "or landlord, nor is the person in reversion entitled thereto, "any other than for the use and occupation of such lands, tene- "ments, or hereditaments, from the death of the tenant for life, "of which advantage had been often taken by the under-tenants, "who thereby avoid paying anything for the same."

Its enactment is, "that from and after the 24th day of "June, 1738, where any tenant for life shall happen to die "before or on the day on which any rent was reserved, or made "payable, upon any demise or lease of any lands, tenements, or "hereditaments, which determined on the death of such tenant "for life, that the executors or administrators of such tenant for "life shall and may, in an action on the case, recover of and "from such under-tenant or under-tenants of such lands, tene- "ments, or hereditaments, if such tenant for life die on the "day on which the same was made payable, the whole, or if "before such day, then a proportion of such rent, according to "the time such tenant for life lived, of the last year, or quarter "of a year, or other time in which the said rent was growing "due as aforesaid, making all just allowances or a proportional "part thereof respectively."

The application of this Statute is, in express terms, confined "to that part of Great Britain called England, dominion "of Wales, and the town of Berwick-upon-Tweed."

The Statute of 4 and 5 Will. IV., upon which the action

FORDYCE *v.* BRIDGES.—23rd February, 1847.

against the Appellant was founded, bears, in its title, that it is "An Act to amend an Act of the 11th year of King George "the Second, respecting the apportionment of rents, annuities, "and other periodical payments." And its preamble is in these terms:—"Whereas doubts have been entertained whether "the provisions of the said Act apply to any case in which the "interests of tenants determine on the death of the person by "whom such interests have been created, and on the death of "any life or lives for which each person was entitled to the "lands demised, although every such case is within the mischief "intended to have been remedied and prevented by the said "Act, and it is therefore desirable that such doubts should "be remedied by a declaratory law."

The second section, being that upon which the action was laid, was thus expressed:—"Be it enacted, That from and after "the passing of this Act all rent-service reserved on any lease "by a tenant in fee, or for any life interest, or by any lease "granted under any power, (and which leases shall have been "granted after the passing of this Act,) and all rents-charge and "other rents, annuities, pensions, dividends, moduses, composi- "tions, and all other payments of every description in the United "Kingdom of Great Britain and Ireland, made payable or "coming due at fixed periods under any instrument that shall "be executed after the passing of this Act, or (being a will or "testamentary instrument) that shall come into operation after "the passing of this Act, shall be apportioned so, and in such "manner, that on the death of any person interested in any "such rents, annuities, pensions, dividends, moduses, compo- "sitions, or other payments as aforesaid, or in the estate, fund, "office, or benefice, from or in respect of which the same shall "be issuing or derived, or on the determination, by any other "means whatsoever, of the interest of any such person, he or "she, and his or her executors, administrators, or assigns, shall "be entitled to a proportion of such rents, annuities, pensions,

" dividends, moduses, compositions, and other payments, ac-
" cording to the time which shall have elapsed from the com-
" mencement or last period of payment thereof respectively, (as
" the case may be,) including the day of the death of such
" person, or of the determination of his or her interest, all just
" allowances and deductions in respect of charges on such rents,
" annuities, pensions, dividends, moduses, compositions, and
" other payments, being made."

The Appellant pleaded in defence to the Respondent's action that, according to the common law of Scotland, the executor of an heir dying between terms was not entitled to the rents falling due at the term succeeding the death, and that the Act 4 and 5 Will. IV. did not extend to Scotland.

The Court, upon advising printed cases for the parties, being divided in opinion, directed them to be laid before the other Judges for their opinion, and thereafter, in conformity with the opinion of a majority of the Judges, found that the Statute in question did apply to Scotland.

The appeal was against this finding.

Mr. J. Anderson for the Appellant.—The 4 and 5 Will. IV. is, in terms, an Act to amend the 11th Geo. II., but the evil intended to be remedied by the latter Statute never existed at any time in Scotland. It never was the case there that, where a liferenter of lands happened to die before the term at which the rent of the lands was payable, the rent payable at that time was not recoverable from the tenant; accordingly, the 11 Geo. II. is, by express terms, not extended to Scotland. The 4 and 5 Will. IV., then, was passed for the amendment of an Act not applicable to Scotland, but an English Act. Its preamble states, that doubts had been entertained of the application of that English Act to particular cases enumerated, "although every " such case is within the mischief intended to have been " remedied and prevented *by the said Act.*"

FORDYCE *v.* BRIDGES.—23rd February, 1847.

Such being the object of the 4 and 5 Will. IV. it provides for a variety of payments whose names, for the greater part, are known only in the law of England; and in regard to such of them as are known in the law of Scotland, no inconvenience has ever been felt as to their apportionment between heir and executor; the rules in regard to this are clearly established, and no intention is apparent, on the face of the Act, to disturb these rules, or to provide any precaution for the preservation of rights which might be injured by its operation if extended to Scotland. If a proprietor of land survive the term of Whitsunday his executor is entitled to the half-year's rent, though it may not be payable till Martinmas, and if he survive Martinmas the executor will be entitled to the whole year's rent, though not payable, by the tenant, till a subsequent term. There is no appearance of any intention in the Act to alter this, or to provide for rights which may be injuriously affected by such an alteration. If its operation shall be extended to Scotland, such a consequence will follow in this as in a variety of other instances which might be suggested.

Although the payments spoken of in the Act are all payments "in the United Kingdom of Great Britain and Ireland," these words were intended to embrace all payments, whether within Scotland or England, but were not intended to extend the operation of the Act to the former country. The rent or payment might be due by a party in Scotland to another resident in England. In such case the Act was to operate between the heir and executor of the latter party; but this description of the locality of the payments will not, against the other expressions of the Act, extend its operation to Scotland.

Mr. Russell for the Respondent was not called on to address the House.

LORD BROUGHAM.—My Lords, there is no difficulty in this case. I do not think it worth calling upon the other side

to argue it. Whatever the legislature may have intended, they have not done that which is contended for, for they have expressly done the contrary. The first part of the Act is declaratory no doubt, and it applies to England alone. The second part of the Act is general, and the legislature there totally changes the phraseology; they enact instead of declaring, and they say it is a remedy for an evil and not a declaration which is wanted, as they do in the first part, and then they use the words, for the first time, "Great Britain and Ireland."

LORD CHANCELLOR.—My Lords, with respect to any doubt as to the notions of the law of Scotland, and as to the intention of the legislature not being defined as it ought to have been in this Act of Parliament, whatever may have been intended, and whatever was in the mind of those who framed the Act, they have, in terms, said, that all payments arising from lands in Great Britain and Ireland shall be subject to this apportionment. Here is a payment arising out of lands in Scotland. Why is not that within the Act? It is within the very words.

LORD BROUGHAM.—It is provided for in terms pretty much as if the Act had said, this rent of Mr. Dingwall's shall be apportioned.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed with costs.

JOHNSTON, FARQUHAR, and LEECH—H. U. and N. COULTHURST, Agents.

[HEARD 23*rd*, JUDGMENT 25*th February*, 1847.]

SIR DAVID BAIRD, of Newbyth, BART., *Appellant.*

MARGARET BAIRD and Others, substitute heirs of tailzie of the lands of Newbyth, and WALTER JAS. L. GILMOUR, *Respondents.*

Tailzie.—Terms of exception from fettering clauses held not to destroy their effect.

Ibid.—A power to the heirs in an entail, to dispone in feu-farm—to excamb—or to sell or dispone such parts of the lands as they shall think fit, on condition that, previous to the sale, the heir making the sale purchase other lands of equal value to those sold; and that the titles of the lands purchased or taken in exchange, be taken to the heirs in the entail under the same conditions as in the entail; and that the purchaser of the lands in the entail should see to the performance of these conditions, is not such a power as nullifies the entail, either as being destructive of the fetters or as making the entail inconsistent with the Statute 1685.

ON the 4th of August, 1737, Sir John Baird executed a deed of entail of a variety of lands, including part of the barony of Whitekirk, the barony of Gilmertoun, with the exception of specified parts of it, parts of the barony of Drum, the entire barony of Broomhills, and parts of the baronies of Fordell and Ellam, in favour of himself and the heirs male of his body, and a variety of other substitutes, "declaring always that it shall be "lawful to me to alter, innovate, and change the succession of "the heirs male or female of my own body in the saids lands "and barony of Broomhills, and teinds, parsonage and vicarage "thereof, and in the saids lands of Over Monenet and Wester "Winshiells, and parsonage-teinds thereof, and corn and walk "milns of the same; as also, that it shall be lawful to me to "alter, innovate, and change the succession of the said Alex-"ander Baird my brother, and the heirs male and female of his

" body, as to the lands, barony, and others immediately above " mentioned, and as to the said lands of Hairhead, Rislabridge, " Bothwell, and miln thereof, and Birkencleuch, and parsonage- " teinds of the saids lands of Hairhead."

The conditions of the entail were that the heirs should use and bear the name and arms of Newbyth; " as also, that it " shall not be liesom nor lawful to any of the heirs of taillie " above mentioned, to alter, innovate, or change the foresaid " taillie, and order of succession above mentioned, or to do any " other deed, directly or indirectly, whereby the same may be " anywise altered, innovate, or changed; nor to sell, dispone, " wadsett, or impignorate, the lands, baronys, and others above " mentioned, or any part or portion thereof, except the lands " barony, teinds, and others, after mentioned, which they have " power to sell, or otherwise dispose of, by virtue of the faculty " hereafter specified, conceived in their favour;" then followed prohibitions against contracting debt or altering the order of succession, fenced as to all the prohibitions by irritant and resolutive clauses.

Immediately after these clauses followed this exception, " Ex- " cepting and reserving always, furth and from the saids clauses " prohibitory and irritant, full power and liberty to the saids " whole heirs and members of taillie above mentioned, to sell, " gift, or dispose of, the saids lands and barony of Broomhills, " comprehending as aforesaid, with the teind-sheaves, and whole " pertinents thereof, above mentioned; as also, the saids lands " and roum of Hairhead, and that particle or portion thereof " called Rislabridge, the said lands of Bothwell, with the miln " thereof, the saids lands of Birkencleuch, and pertinents thereof " above mentioned, with the parsonage-teinds of the saids lands " of Hairhead, the saids lands of Over Monenet, and the saids " lands of Wester Winshiels, with the corn and walk milns of " the same, and warrandice lands thereof above specified, with " the teind-sheaves and parsonage-teinds of the said lands of

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" Over Monenet, and that either irredeemably or under rever-
" sion, as they shall think fitt, and to grant infeftments of
" annual-rent or in security in the same, and to sett tacks
" thereof for such spaces and duties as they shall think proper,
" and to contract debts, and do all other deeds in relation to a
" free disposall of the lands, teinds, and others, immediately
" above mentioned, free of the saids conditions, provisions,
" restrictions, limitations, clauses resolutive and irritant above
" mentioned, in the same manner, and as freely in all respects,
" as if the saids conditions, limitations, clauses irritant, and
" others aforesaid, had not been insert and contained hereintill;
" but with this provision always, as it is hereby specially pro-
" vided and declared, that the lands, barony, and others imme-
" diately above mentioned, and which my heirs of taillie have
" power to dispose of by the above faculty, are and shall be
" really burdened and affected with what debts and sums of
" money are resting and owing by me, or shall be resting and
" unpaid by me at my decease."

Then followed a power to the heirs of taillie to grant life-rents to wives and husbands, and to provide for younger children; and after this was a clause in these terms, " And further, reserv-
" ing full power, liberty, and license to the saids heirs, and
" members of taillie above mentioned, to dispone in feu-farm
" such parts of the said taillied lands and estate as they shall
" think fitt, provided the feu-duties payable by these feu-rights
" be without diminution of the rentall, and that the feu-rights
" be to be holden of the granter, and the same heirs of taillie
" who are hereby appointed to succeed to the saids lands and
" estate, and that the feu-duties be payable to the granter and
" the saids heirs of taillie, and no others: as also, to excamb
" such parts of the said taillied lands and estate as they shall
" think expedient, with other lands of the same value and
" yearly free rent with those parts of the said lands and estate
" so excambed: as also, to sell off and dispone such parts and

" portions of the said taillied lands and estate as the said heirs " of taillie shall think fitt; providing that the heirs of taillie so " selling do, previous to the sale, purchase other lands, to the " full value of so much of the saids lands and estates as shall " happen to be sold off; and also, providing that the rights and " conveyances of the lands to be purchased, by excambion, or " otherwise, be taken in favours of that heir so excambing or " purchasing, and the other heirs of taillie and successors, above " mentioned, according to the order of the substitution above " specified, and with and under the same conditions, provi- " sions, reservations, restrictions, limitations, clauses irritant, " and facultys, with which the right of the lands and estate " above mentioned is hereby qualified; as also, that the pur- " chasers of any part of the said taillied estate, whether by " excambion or sale, shall be holden and obliged to see that " the lands purchased by the said heir of taillie are at least to " the value of the lands to be sold by him, and that the rights " and securities thereof are taken to the same heirs of taillie, " and in the same terms and upon the same conditions, restric- " tions, facultys, and irritancys, with this present taillie, and " that the disposition and contract of excambion are duly " registered in the Register of Taillies, and compleated by a " charter under the Great Seal, and infeftment following there- " upon; declaring always, that it shall not be liesome nor lawfull " to the said heirs of taillie to feu out, excamb, or sell off, " the mannor-places of Newbyth and Gilmertoun, nor office- " houses thereto belonging, nor the yeards, parks, or other " inclosures about the said two mannor-places for the time, " which are hereby expressly excepted from the above faculty."

A series of titles was made up by successive heirs under this entail, until the lands came to be vested in the Appellant, who likewise made up his title under it.

In the month of May, 1841, the Appellant brought an action against the substitute heirs of entail, concluding to have it

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found generally that he had full and perfect right and power to exercise every power, and do and grant all acts and deeds in relation to the lands embraced by the entail, competent to proprietors of lands in fee-simple, without being liable to any irritancy or forfeiture under the entail, or to any claim for damages or reinvestment of the price of the lands he might sell or otherwise dispose of, at the instance of the substitutes called by the entail, or at all events that he was entitled to sell or dispose of the whole lands except the manor-places of Newbyth and Gilmerton.

The defence to this action was rested generally upon the terms of the entail, as excluding the power which the Appellant sought to have declared.

Subsequently, the Appellant assuming that he had the power, sold a part of the lands to the Respondent Gilmour, who brought a suspension as of a threatened charge for the purchase-money, upon the ground that the Appellant could not give him a title. This suspension and the action, at the instance of the Appellant, were conjoined, a record was then prepared in which a variety of pleas were stated by the parties, which need not be repeated here, as only two points were relied upon at the hearing of the appeal, which will be stated in their proper place.

On advising the record the Lord Ordinary, (*Cunningham,*) ordered the entail and the record to be printed and boxed for the Inner House, in order to the case being reported by him. At the same time he issued the following note, which will give a general idea of the shape the arguments assumed in the Court below.

"The deed of entail, which is the subject of the present "action, contains certain clauses so uncommon, and so much "at variance with the purpose and object of tailzies in general, "that the Lord Ordinary feels it his duty to report the case, as "one of novelty and importance, to the Court.

"The entail was executed by Sir John Baird of Newbyth,

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" in 1737. It commences with a dispositive clause, containing " a description of the numerous properties proposed to be " entailed; then follow the prohibitory, irritant, and resolutive " clauses; *after* which sundry powers are conferred on the " future *heirs*, one of which raises the question now to be con- " sidered by the Court.

" According to the first branch of the tailzie, and, in par- " ticular, by the leading clause of prohibition (Deed of Entail, " p. 17), the heirs of entail are expressly prohibited from selling; " but, towards the conclusion of the clause, there is a *reserva- " tion* of a faculty to sell the lands of Broomhills, and certain " parts or pertinents, apparently connected with the same, " which the heirs are permitted to sell at any period they might " think fit, and without any onerous cause or restraining pre- " caution, it being only provided that the price of that portion " of the lands, if sold, should be liable for any debts or dona- " tions that might be left by the entailer.

" It is not on *that* permission of the tailzie that the question " at issue arises. But, by a subsequent and separate clause of " the entail, a power is given to sell or excamb *the whole estate*, " and even any lands that might be acquired *in lieu thereof*, for " ever; the only *exceptions* from that power being the manor- " houses of Gilmerton and Newbyth, and the pleasure-grounds " and lawns connected therewith. The question is, If that " power be consistent with the spirit or letter of the Act 1685; " and *next*, If it is regulated and restrained by such irritant " and resolutive clauses as the Act requires to keep every right " conferred on heirs within the limits indicated by the entailer.

" I. The first question arising for consideration, it is sup- " posed, must be decided on general principles, without the aid " of precedents in point, as it does not appear that any entail of " similar structure and powers has ever fallen under review of " this Court in any prior case.

" The extensive powers conferred by this entail, as to *selling*

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"and *exchanging*, are apparent on the face of the deed. They "may be exercised for perpetuity to the effect of alienating the "whole estate, with the exception of the manor-houses of Gil- "merton and Newbyth, and their immediate pertinents. For, "supposing the ancient estate sold, and new properties substi- "tuted for it, according to the unusual, and not very prac- "ticable, course of proceeding pointed out in the tailzie, the "new deeds of entail must have the *same clauses* inserted *lite- "ratim*, which occur in the original tailzie, and *inter alia* with "the same extensive powers of sale which that deed confers. "It is, therefore, a question which remains now to be tried for "the first time, whether an entail, whereby the whole estate, "with certain trifling exceptions, may be sold, and resold, and "exchanged, twenty times in the course of a single life, be the "sort of entail which the Act 1685 intended to legalize.

"As at present advised, the Lord Ordinary views this as a "question at least of great doubt, well entitled to the most "deliberate consideration of the Court. It is thought that the "view of the Legislature, in passing the Act 1685, was to "enable proprietors to secure the succession in their families of "*specific estates*, to which they had an attachment of longer or "shorter duration. In the case of Ascog, that was a leading "consideration to show that the heirs, after sale, were no longer "bound to reinvest the price. But an entail with a never- "ending power of sale, of nearly the whole entailed subjects, is "truly not an entail of land, but it is an entail of its *price* or "*value*, which the statute never contemplated.

"When it is found, however, that a species of succession "is attempted to be created, in the form of an entail, which is "not consistent with the true object and purpose of the Act "1685, it will not be sustained as an effectual or subsisting "entail under the statute. Thus, in a class of cases of a dif- "ferent description, which were long the subject of very learned "discussion, when the succession of a tailzied estate falls to

" the *heirs whatsoever* of any of the substitutes, without a dis-
" tinct exclusion of *heirs-portioners*, the entail is held as no
" longer consistent with, or protected by, the Act 1685, because
" the possible subdivision of the estate, by its transmission to
" heirs-portioners, and to an indefinite series of heiresses, puts
" an end to the preservation of the estate. That doctrine is
" not the subject of any special enactment in the Act; but it
" was first deduced, from a reference to the purpose and scope
" of the Act, in the noted case of Culzean, in 1760, (Dict.,
" p. 15412,) which has been uniformly followed as a precedent.
" See the late cases of Farquhar in 1838, (1 Dunlop and Bell,
" page 121,) and Craig against M'Culloch, page 545 of same
" volume.

" II. A second and relative inquiry falls to be discussed in
" the present case, founded on the position and phraseology of
" the power of sale in the deed of entail, which is, Whether the
" perpetual, and (in one sense) unrestrained powers of sale,
" given to the heirs under this tailzie, are so framed and guarded
" as to place the rights and titles, both of the sellers and the
" buyers of new estates purchased, effectually beyond the reach
" of the *onerous creditors* of heirs making the purchases?

" The power of sale, under the latter clauses of the entail,
" is given under the condition, (printed Entail, p. 20,) 'that
" 'the heirs of tailzie so selling shall, *previous to the sale*, pur-
" 'chase other lands to the full value of so much of the lands
" 'and estate as shall happen to be sold off;' and the right of
" *the purchaser* of the entailed estate is qualified with the fol-
" lowing provisions, that 'the purchasers of any part of the said
" 'taillied estate, whether by excambion or sale, shall be holden
" 'and obliged to see that the lands purchased by the said heir
" 'of tailzie are at least to the value of the lands to be sold by
" 'him, and that the rights and securities thereof are taken to
" 'the same heirs of taillie, and in the same terms and upon the
" 'same conditions, restrictions, faculties, and irritancies, with

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" ' this present taillie, and that the disposition, and contract of " ' excambion, are duly registered in the Register of Taillies, " ' and completed by a charter under the Great Seal, and infeft- " ' ment following thereupon.'

" These clauses are explicit and clear in their import; but " the pursuer contends that they are ineffectual and inoperative " against third parties and creditors, as the contravention of " them, either by heir or purchaser, is not fortified with *irritant* " *and resolutive clauses.* The Lord Ordinary conceives this to " be a plea attended with great difficulty; and it does not " appear to have been presented to the Court, under the same " specialties, in any preceding case.

" The answer made to it by the substitute heirs is, that the " primary clause of prohibition prohibited all sales, excepting " only under the *faculty* created by the subsequent general " power to sell, conferred towards the conclusion of the deed; " and, therefore, that sales not in precise conformity with the " faculty, fall expressly within the irritant and resolutive clauses " of the entail. But it is manifest that the faculty reserved in " the prohibitory clause, here referred to, applies solely to the " lands of *Broomhills* and pertinents, which immediately follows " the irritant and resolutive clauses, (see Deed of Entail, " pp. 17 and 18,) and does not apply to the more general and " extensive sales permitted under the latter clauses of the " deed.

" The general and very material question, then, which arises " here, is, whether, when an entailer first prohibits sales gene- " rally, and afterwards recalls that prohibition, and grants a " power of sale almost unlimited, in point of extent and occur- " rence, that condition of the tailzie can be effectual against " onerous third parties, without being fortified by irritant and " resolutive clauses.

" It has been argued that permissive clauses, following pro- " hibitory, irritant, and resolutive clauses, do not, in general,

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" require a repetition of the irritancies to insure the observance, " by heirs and third parties, of all the conditions of the permis- " sion. And certainly, when an entail prohibits any act or " deed affecting the preservation of the estate, such as granting " long leases or feus, and then grants a power of feuing, or of " letting leases of more than ordinary endurance, it has not " been thought necessary, hitherto, to guard against any abuse " in the exercise of the power by a repetition of the irritant and " resolutive clauses. But these cases are not precisely analo- " gous with the present. A permission to grant feus or leases " is consistent with the preservation of a valuable interest in " the estate; and so is a faculty to contract debt to a limited " amount, or to appoint the order of succession, by filling in " one branch of a substitution left blank, and other similar " powers. But a right to sell and alienate the whole estate " (whatever may have been intended) may be viewed as a sub- " stantial recall of the previous prohibition, and as requiring " all the precautions and guards which the statute exacts, to " give effect to new or *separate* prohibitions of an entail.

" As a question occurring now for the first time in the law " of entail, the Lord Ordinary cannot venture to offer a deci- " sive opinion upon it, without farther conference with the " Court.

" The summons contains an alternative conclusion, founded " on the two preceding pleas, to the following effect:—' That " ' it ought and should be found and declared, by decree of our " ' said Lords, that the pursuer is entitled to sell, dispone, " ' wadset, or impignorate, either for onerous causes or gratui- " ' tously, at his own pleasure, the *whole*, or any part, of the " ' lands and estates contained in the said entail, other than, " ' and except, the said two manor-places of Newbyth and Gil- " ' merton, office-houses thereto belonging, and yards, parks, or " ' other inclosures, about the said two manor-places, for the " ' time, without interference from, or consequent claim or

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" 'right of any sort arising to, the said heirs of entail, or any of " 'them: Or, at all events, that in purchasing other lands, in " 'lieu of the lands and others by the said entail allowed to be " 'sold, he is entitled to make the price of the lands so pur- " 'chased a real burden, in whole or in part, on the lands pur- " 'chased; which burden shall be effectual to the creditors " 'therein, notwithstanding of any entail that may be executed " 'of the said purchased lands.'

" Farther, in order to try the validity of *a sale*, the pursuer " has actually *sold* a portion of the estate of Newbyth to his " neighbour Mr. Little Gilmour, *without following out the order* " *prescribed by the entail*, by purchasing and entailing an equi- " valent portion of other land. If that be a valid and effectual " restraint, binding on purchasers and third parties, Mr. Gil- " mour will not be safe in entering into the transaction; and " he has presented a *Note of Suspension*, to try the question, " against a threatened charge for the price. That suspension " has been *conjoined* with the present declarator, and must of " course follow its fate.

" With regard to the other pleas stated for the pursuer, " under the 3rd, 4th, 5th, 6th, and 7th heads of his argument, " the Lord Ordinary has only to state generally, that he has " not been able to satisfy himself that any of these pleas can " be sustained with due regard to late decisions of authority, in " which similar pleas have been overruled upon entails, the " terms of which gave at least as much room for maintaining " the objections as the entail now before the Court.

" In particular, the objection to the irritant clause of the " entail here urged (under the 6th head of the pursuer's case) " does not seem tenable. The clause here sets out with the " comprehensive declaration, that 'if any of the heirs of tailzie " 'above mentioned shall act and *do in the contrair of the par-* " *'iculars above specified, or any of them*,' &c., &c., the act shall " be null, &c. If an irritant clause, so expressed, were not

" held to comprehend all the prohibitions of the entail, it would, " it is thought, be carrying hypercriticism to an extreme never " yet countenanced, even in cases of the class to which the " present belongs.

" The whole pleas in the case are, without farther observa- " tion, submitted to the consideration of the Court."

The Inner House directed the papers to be laid before the other Judges for their opinion, and ultimately, by interlocutors of the 10th February and 5th March, 1844, in conformity with that opinion, " sustained the defences and assoilzied the " defenders from the conclusions of the action, and in the sus- " pension suspended the letters simpliciter."

The *Lord Advocate*, *Sir F. Kelly*, and *Mr. Anderson* for the Appellants.

I. The prohibitions in the entail against selling and burdening the lands apply solely to the manor-places of Newbyth and Gilmerton. The only *entire* barony conveyed by the entail is the barony of Broomhills; as to Gilmerton and the other baronies mentioned, only parts of these were conveyed. When, therefore, the exception from the fettering clauses speaks of " the lands, barony, teinds, and others," it uses expressions applicable to the whole lands embraced by the deed. It is no doubt true that there follows a faculty specially applicable to the barony of Broomhills alone, amounting to a power to take it entirely out of the entail; but had the exception from the fettering clauses been intended to apply to this, the leading word would not have been " lands," but " barony," and the name of the barony would have been given, whereas the words used, " lands, barony, teinds, and others," are comprehensive enough to embrace the whole lands, the sole entire barony as well as the parts of baronies conveyed, and for this purpose are strictly accurate in using the word " *barony*" in the singular; no necessity, therefore, arises from that use of the word to

confine the exception to Broomhills alone; moreover, the exception in the fettering clauses follows immediately the prohibition to sell, and in terms is an exception from that prohibition alone; but the power as to Broomhills is greatly more extensive than a power to sell, it is to take that barony entirely out of the entail, *quovis modo*, while the power in regard to the lands generally is confined to sale, or to a power of the same kind as that in the prohibition to which the exception is annexed.

As to the use of the word "faculty," in the singular, in the exception from the prohibitory clauses, there is nothing which should confine the application of that exception to the power to take Broomhills out of the entail, if it could be so applied, and prevent its application, at the same time, to the power to sell any of the other lands conditionally. There is nothing either inconsistent or ungrammatical in using "faculty" to imply a power of one kind as to certain lands, and of another or of several other kinds as to other lands, any more than there would be in confining the exercise of the power to one kind in regard to these other lands, instead of extending it to include several kinds; and yet the entailer has used the word in this plural signification, for he uses the word "faculty" as comprehending powers to dispone in feu-farm—to excamb—and to sell or dispone: all of these he comprehends by the words "the above "*faculty.*" The term "faculty," therefore, in this exception from the fettering clauses, is, in the language of the entailer, used in an extensive generic sense, to comprehend powers of various kinds, a power to take Broomhills out of the entail altogether and *unconditionally*, and to dispone in feu-farm, excamb, or sell the other lands *conditionally*, with the exception only of the manor-places of Newbyth and Gilmerton. The exception, therefore, is broad enough to embrace both powers to sell Broomhills unconditionally and the other lands unconditionally. But if it must be confined to one and a choice must be made between the two, a comparison of the language used in both points

out the power to sell conditionally, as that which must be adopted; for that power to sell unconditionally sets out thus:—"Except-"ing and reserving always furth and from the said clauses, pro-"hibitions," &c., as if for the first time mentioned, whereas the power to sell conditionally, as if it had been spoken of before, begins at once:—"And reserving full power, liberty, "and licence to the said heirs and members of taillie above "mentioned, to dispone in feu-farm," &c. If this be so, then all that is included in the faculty to sell conditionally, that is, all the lands except the manor-places of Newbyth and Gilmerton, is excluded from the prohibitory clause, and the entail is as if it had no prohibitory clause except in regard to these manor-places.

II. Assuming that the exception in the prohibitory clause applies only to the power given to sell Broomhills, the question still remains whether the power given in regard to the other lands to sell or excamb them, with a provision that lands of equal value be brought within the entail, does not nevertheless destroy the fetters of the entail. The clause is introduced after the fetters by these words:—"And further reserving full power, "liberty, and licence," &c.; it is a reservation, therefore, or exception from these fetters of a power to sell, *toties quoties*, without end or restriction, and with an introduction of all the inconveniences which were so fully considered, and which formed so material consideration in the judgment of this House in Stewart *v.* Fullerton, 4 *Wil. & Sh.* 196.

Even if this provision, in regard to bringing within the entail lands of an equal value with those sold or excambed, were in the form of a condition annexed to the power to sell or excamb, it would be a condition not incapable of performance, but incapable of performance for any effect. In regard to these new lands, should the heir exercising the power to sell or excamb be in debt at the time, and perform the condition in its terms by executing a new entail of lands purchased by him to supply

the place of those sold or excambed, the lands sold or excambed, would in this view be freed from the fetters of the original entail, but the lands put under this new entail would be open to adjudication by the creditors of the heir making it, for in regard to them the heir would in truth be an entailer, who cannot by his own deed withdraw his lands from the diligence of his creditors. This would equally be the case, whether the new lands were bought with the price of the old ones, or with the money of the heir, his own, or borrowed for the purpose. Still further, if the provision be a condition, it is a condition not upon the exception or reservation from the fettering clauses, that is absolute and unconditional, but upon the exercise of the power of sale, and is confined merely to the *purchase* of other lands. All that can by possibility give the clause the effect of a condition precedent is the use of the words "previous to the sale," but these do not extend to the title to be taken to the lands to be purchased, or the particular mode of their conveyance. The condition, therefore, would be fulfilled by a purchase resting upon parole agreement, or missive of sale, although the title afterwards taken might be in fee-simple. And even if the title to the new lands should be taken in the form of an entail, there is no obligation upon the heir making the sale and purchase to record this new entail, or voiding the sale unless he do so,—that is left to the purchaser from him, who may or may not see to its performance, and no time is specified within which he must do so. In every view, therefore, assuming the clause to have the effect of a condition, it must be inoperative.

But in truth it is no condition at all. It rests entirely upon obligation—it imposes an obligation upon the heir exercising the power of sale to purchase other lands. This obligation may or may not be the foundation of an action against the heir to compel its performance, but its nonperformance would not void the sale which may have been made—that would stand unchallengeable, for the obligation is no way fenced,

which could alone have made it operative for the purpose desired. If, therefore, the heir desiring to sell part of the lands in this entail should have acquired other lands of equal value by right of purchase, the lands in the entail would be set loose, and a third party would be in safety to deal with him for their purchase. All that would remain to the substitutes of entail would be a power to enforce, against the heir selling, the obligation to take the titles to the new lands in the form of an entail; but should the seller of these lands refuse obstinately or capriciously to give a conveyance in that form, there would not be any means open to the substitutes of entail to compel him to do so—he would not in any way be affected by the provisions of this entail.

III. If the power to sell or excamb be upon condition of a repurchase of other lands, an entail with such a power was not in contemplation of the Statute 1685, and is not protected by its provisions. Such an entail would be an entail in the abstract—capable of being shifted from one set of lands to another, and not confined to any in particular. The policy of the Statute was to enable landowners to preserve their particular estates in their families by putting them *extra commercium*, whereas an entail like this contradicts that policy, by giving a power to sell as often as whim or caprice or any other motive may dictate.

It is under the Statute alone that entails have any validity. Unless, therefore, the deed in question can be brought within the provisions of the Statute, it cannot have any effect against an onerous purchaser; now the Statute in express terms gives power to the lieges to tailzie, not any lands, but "*their* lands," and the tailzie is to be with clauses whereby "it shall not be "lawful" to the heirs "to sell, annailzie, or dispone *the said lands* "or any part thereof, or contract debt, or do any deed whereby "the succession to the lands may be frustrate," and it declares that only "*such* tailzies" shall be allowed "in which these "clauses shall be insert."

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The Statute makes no mention of sale, absolute or conditional, or upon conditions precedent or subsequent, beneficial or injurious. It mentions simply a prohibition against sale. A power which enables the heir to put an end to the entail at once and for ever may be very good; but one that enables him, as the power in the present case does, to do that which is manifestly inconsistent with the entail, and at the same time requires him to keep up the entail, is without the contemplation of the Statute, and cannot be good.

If conditions are once introduced, where is the Court to stop? May there not be a mere nominal condition? Or if the condition must be valuable, how is the proportionate value to be ascertained? according to what lights, for the Statute gives none? It protects entails with simple prohibitions against sale; but a power to sell, whether absolute or upon condition, is equally against the prohibition and destructive of it, at least as to the particular lands entailed.

The Statute allows parties to entail "their" lands, but if the entail gives power to sell these lands upon condition of entailing others, and so doing, *toties quoties*, the entail is not of any particular lands, as contemplated by the Statute, but of any lands whatsoever.

The *Hon. Mr. Wortley* and *Mr. Rolt* were heard for the Respondents.

LORD CHANCELLOR.—My Lords, in this case the object of the suit in the Court of Session was to have it declared that the entail was entirely void, or at all events, that there was a power of sale, arising from the imperfect mode in which the estate was guarded against sale by the deed of entail; and the question turns principally upon the construction which has been put upon three clauses in the deed.

The deed of entail prohibiting sale has this exception, "Ex-

"cept the lands, barony, teinds, and others after mentioned, "which they have power to sell or otherwise dispose of, by "virtue of the faculty hereafter specified, conceived in their "favours." The argument is, that in the subsequent part of the deed, where the exception is to be looked for, there is an exception equally extensive with the prohibition, and therefore, that it is to be read as if they were prohibited from selling except as they may sell. My noble and learned friend reminds me that there is an exception, at all events, with regard to the mansion-houses; but I am speaking of the rest of the estate.

Now that would be a very strange construction, beyond all doubt, because it would be proving that the party had intended that which was absurd upon the face of it, prohibiting nothing to be done, except that you may do it. It might by possibility happen, that by inadvertence some such provision might have crept into the deed, but it is a construction which a court of justice would be most reluctant to admit, because it is quite clear that it could not be the intention of the party. But when we come to look at the subsequent parts of the deed, it does not appear to me that there is any difficulty whatever in putting a construction upon the clause quite consistent with what most obviously was the intention of the party. It is, "Except the "lands, *barony*," in the singular, "by virtue of the faculty," in the singular, "hereafter specified." There are two faculties. There are two powers after specified. The one applies to the barony of Broomhills, which was not intended to be included in the entail at all; that is to say, power was given of sale absolutely so far as concerned the barony of Broomhills and the lands belonging to it. And there is another faculty, which authorised what we should, in this country, call a power of sale and exchange.

With regard to the barony of Broomhills, the power is, "Excepting and reserving always furth, and from the saids "clauses prohibitory and irritant, full power and liberty to the "saids whole heirs and members of taillie, above mentioned, to

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"sell, gift, or dispose of the saids lands and barony of Broom-"hills," repeating the prohibitions.

Then, when we come to look to this exception, we find it described as reserving out of the clauses prohibitory and irritant, full power to sell, &c. But when we come to the clause giving power of sale and exchange, that form of expression is entirely dropped, and we have a power of sale and exchange, not excepted out of the prohibitory clauses, but "further re-"serving full power, liberty, and licence to the said heirs and "members of taillie" to sell such part of the lands as should be thought expedient, substituting other lands in their place.

Here, therefore, there is one barony; and the exception is only of one barony. We find that the first faculty applies to the barony of Broomhills by name; it is so described, and as to it there is given an absolute power of sale. When we come to the faculty or power to sell or exchange, it applies to all the rest of the estate, with the exception of the mansion-houses, which are particularly excepted. Now, to say that the exception applies to the second faculty or power to sell and exchange, would be putting a construction upon this deed as to which there is not a moment's doubt. The intention of the parties is very clearly expressed,—the exception in the prohibitory clause applies only to the barony of Broomhills.

Then other objections have been raised as to the power of sale and exchange. And I believe that the only reason why we thought it expedient to hear the case out on the part of the Respondent, was, that it was stated to be a new point. Now, it was very extraordinary that it should be a new point, and that no case should be referred to where the precise question had arisen, because it is neither more nor less than that which is of continual occurrence in this country—a power to sell and exchange; that is to say, to exchange one portion of land as a substitute for another. The only difference here is, that you do not substitute one portion of land for another, but you sell a

portion of the land, and in substitution for the part so sold other land is bought in some other quarter. Now, this provision is simply to effect that purpose, that whereas it might be difficult to exchange, in the ordinary sense of the word, power is given to the parties to sell a part of the land, upon condition of other land procured *aliunde* being substituted in the place of that so sold.

Now, it has been argued that there might be difficulties in effecting this purpose. It does not appear to me that, if such was the purpose, those difficulties, whatever they may be, at all affect the question, because here the entail is to cease, that is to say, the power of selling is to come into operation upon the happening of a future event; and it is not disputed that the entail of the estate may be made so to determine. Then what is the event upon which this entail is to determine? It is, upon other lands being procured and substituted and settled for the same purposes as the lands originally entailed, then the entail as to those lands is to cease, and, by means of the power of sale, a good title is to be given to the purchaser. That event is to precede the power of sale. That may no doubt create difficulties, but not difficulties insurmountable, because we know that it may be so arranged that the transaction would be simultaneous, the money coming in for the estate sold may be the means of paying for the estate purchased.

But if those difficulties are such that they cannot be overcome, all that can be said is, that the event has not happened upon which the entail is to cease and the power of sale is to arise. Nothing can be more plain in the terms of this faculty than that, previously to the sale, other lands are to be purchased and to be taken in favour of the same series of heirs, and subject to the same conditions as the lands originally entailed.

Then it is said that there is an omission here, that there is no provision that the entail of these newly-purchased lands is to be registered. All I can say upon that is, that the event

may not happen upon which the power of sale arises. But here the question is, whether the legal entail is void; because that is the object of the present suit. But even this registration is provided for, because the purchaser of the lands entailed is bound to see that the entail is not only properly created, but is registered; he therefore gets no title until that is done; the event does not arise in which he would have a good title; the power of sale does not arise. He therefore is the person of all others most interested in seeing that the newly-acquired lands are properly settled, for the same purposes as the lands originally entailed, before he can venture to accept the title or to pay his purchase-money for the lands, to let loose the lands to be conveyed to him under a good title.

My Lords, these considerations seem to me to remove all doubt as to the present case. In short, except for the construction of the original entail, I apprehend that the question would not have been raised; and when that deed is looked at, the construction appears to be very plain, that the exception applies to the lands of Broomhills; and with regard to the rest of the lands, there does not appear to me to be the least difficulty.

Lord Brougham.—My Lords, I take exactly the same view as my noble and learned friend, and have done so from the beginning and throughout the argument. I quite agree with him, that had it not been for the question upon the entail, we should not have heard much upon this point. But in this I also agree with him, that there is nothing in this case but the question of whether the exception eats up the rule or not—whether if there is a rule laid down, it is entirely eaten up by the exception. I, with my noble and learned friend, do not mean to say that it is impossible that the deed could have been so inadvertently framed. It clearly could never have been the intention of the parties; but I do not say that it might not *per*

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incuriam, by a clumsiness of expression or by the omission of apt and proper words, have been made so absurd and so contrary to the manifest intention of the maker, as that the exception should be co-extensive or nearly co-extensive with the rule. Nevertheless, that is a construction which every Court would be most slow and most reluctant to put upon it, because, unless it clearly is the inevitable construction, and there is no avoiding it and no escape from it, it is the very last thing that you would do to entirely contravene the intention. It would be, for example, as if the grant of a patent were made prohibiting all the Queen's subjects from using the patent invention for fourteen years, and excepting from the prohibition all the male subjects of the Queen, and excepting from the prohibition also all the female subjects of the Queen, which of course would make the prohibition not worth the parchment upon which it was written. I do not mean to say that the Crown might not *per incuriam* make a grant with such an exception, making the prohibition utterly void,—that would be the same case as this,—but still it would be one upon which such a question hardly could arise, for nobody would take the trouble of bringing a *scire facias* to repeal letters-patent which prohibited nobody, all the males and all the females being excepted, thus exhausting the whole of the Queen's subjects. I do not suppose that anybody would take the trouble of going into the Court of Exchequer with a *scire facias* to repeal those letters-patent. But if they were to be so advised, it would be the most difficult thing in the world to persuade that Court that that was the intention of the letters-patent. So here I think we must have recourse to any construction rather than take that construction—to any construction which the rest of the deed, taken all together, would fairly appear to authorise. My noble and learned friend has shown that this is really not the case here. There is no pretence for saying, when we look at the rest of the deed, that the exception is co-extensive with the prohibition.

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My Lords, I therefore entirely agree with my noble and learned friend, that in this case we ought to affirm the decision of the Court below, and to affirm it with costs.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of, be affirmed with costs.

SPOTTISWOODE and ROBERTSON—DEANS, DUNLOP, and HOPE, Agents.

[HEARD 4*th March*, JUDGMENT 9*th March*, 1847.]

LADY SOPHIA FREDERICA CHRISTINA HASTINGS, MARCHIONESS OF BUTE, LADY EDITH RAWDON HASTINGS, LORD HENRY WEYSFORD CHARLES PLANTAGENET HASTINGS, *Appellants.*

The MOST NOBLE PAULYN REGINALD SERLO, MARQUIS OF HASTINGS and EARL OF LOUDON, by Guardian and Factive *loco tutoris*, *Respondent.*

Deeds, Construction given to.—Shifting Clause.—Clause of Devolution.—A clause in a marriage contract and entail of the lands of *Whiteacre*, the property of the wife, declared, that in case an heir of the marriage should "succeed to the honours and estate of *Blackacre*," to which the husband was expectant heir, then that heir's second son, and failing a second son, then his eldest daughter should "succeed" to the lands of *Whiteacre*, the property of the wife. A female heir of entail succeeded to the honours and estate of *Blackacre*, and married a husband who was possessor of lands in England, settled upon him for life, with remainder to his sons in tail male. By Act of Parliament the lands of *Blackacre* were exchanged for those English lands, and settled in the same way—the effect being, to set the English estates free and enable the husband to sell them for payment of his debts, and to substitute the lands of *Blackacre* in the uses of the English settlement, and give them to the children of the marriage in tail male. *Held*, that an heir under the entail of *Whiteacre* taking the lands of *Blackacre* under this arrangement, did not "succeed" to these lands in the meaning in which that term was used in the entail of *Whiteacre*, and that the shifting clause in that entail did not thereby come into operation.

IN the year 1720 the Countess of Glasgow was heiress in possession in her own right of the lands of Rowallan, the estate of the ancient family of Mure. In contemplation of the marriage of her daughter, Lady Jean Boyle, with James Campbell,

brother of the then Earl of Loudon, an antenuptial contract, bearing date 29th March, 1720, was entered into, to which the Countess of Glasgow became a party.

By this contract, James Campbell bound himself to invest 3500*l.* of his own money, and 1500*l.* which he was to receive from the Earl of Glasgow, upon real securities, in favour of himself and the heirs male and female of the intended marriage. "And in case there shall be one heir-male existing of this pre-"sent marriage at the time of the said Master James Campbell "his decease, and not succeeding to the estate of Rowallan, "through the existence of one heir-male betwixt the said David "Earl of Glasgow and the said Jean Countess of Glasgow, his "lady, he binds and obliges him and his foresaids to provide and "secure the said heir-male in the sum of other 5000*l.* sterling "out of the first and readiest of any estate, heritable or move-"able, that shall belong to him at the time, at least that the said "heir-male shall succeed to an estate answerable to the said other "5000*l.* sterling: but if the said heir-male of this marriage "shall succeed to the said estate of Rowallan, then this oblige-"ment for payment of the said other 5000*l.* sterling, or giving "lands or other effects for the samen, shall be void and null." And on the other part, the Earl of Glasgow bound himself to pay to Campbell 1500*l.*, in full of everything his daughter could claim through his decease. The contract then continued thus: "And moreover, in regard the said Jean Countess of "Glasgow, heretable proprietrix of the lands and barony of "Rowallan after disponed, is resolved to settle the succession of "the said estate, with consent of the said David Earl of Glas-"gow, her husband, in favours of the heirs-male procreate or to "be procreate betwixt her and the said Earl; which failzieing, "to the said Lady Jean Boyle, and the heirs-male of her body "to be lawfully procreate betwixt her and the said Mr. James "Campbell, her promised husband; which failzieing, to the "other heirs of tailzie after mentioned (with and under the ex-

" press reservations, conditions, burdens, provisions, and others " after mentioned)" therefore the Countess granted procuratory of resignation for new infeftment in favour of herself and her husband, and the longest liver of them, in life-rent, " and the heirs-male lawfully to be procreate betwixt them " in fee; which failzieing, to the heirs-female of the body of the " said heir-male, the eldest always secluding the rest and succeeding without division; which also failzieing, to the said " Lady Jean Boyle, and the heirs-male to be lawfully procreate " of her body of this present marriage, and the heirs-male of " their bodys; which failzieing, to the heirs-female to be procreate of the body of the heir-male of this marriage, the " eldest always secluding the rest and succeeding without division, as said is; which failzieing, to the heirs-female to be " lawfully procreate of the said Lady Jean Boyle her body of " this present marriage, and the heirs male or female of their " bodys, the eldest heir-female always secluding the rest and " succeeding without division, as said is; which failzieing, to " the heirs-male of the said Lady Jean Boyle her body of any " lawfull subsequent marriage, and the heirs-male of their " bodys; which failzieing, to the heirs-female of the said heir-" male; which failzieing, to the heirs-female of the said Lady " Jean Boyle her body of any lawfull subsequent marriage, and " the heirs male or female of their bodys, the eldest female " always secluding the rest and succeeding without division, as " said is; which failzieing, to Lady Ann Boyle, second lawfull " daughter procreate betwixt the said David Earl of Glasgow " and the said Jean Countess of Glasgow, his lady, and the " heirs-male of the said Lady Ann Boyle her body, and the " heirs-male of their bodies:" and a series of other substitutes.

A clause provided that the heirs of entail should bear the arms of Mure of Rowallan, in these terms: " And sicklike, it's " hereby specially provided and declared, and appointed to be

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" contained in the infeftments to follow hereupon, that the " whole heirs-male who shall succeed to the said estate of Row- " allan (conform to the clause of succession above mentioned) " shall be holden and obliged to assume and continue the sir- " name of Mure, and to carry and retain the proper arms of the " family of Rowallan in all time coming; and also declaring, " that if the saids lands and barony of Rowallan, teinds and " others foresaids, with the pertinents (by the deficiency of " heirs-male), shall fall to the heirs-female, and that they shall " succeed to the samen in the event foresaid, by vertue of " the substitution and tailzie @mentioned, then and in that case " the eldest heir-female shall exclude all other heirs-portioners " and succeed without division, and be bound and obliged to " marry a gentleman of the sirname of Mure, or at least whose " children to be procreate of the saids rex'ive marriages, and " succeeding as said is, shall be bound and obliged to carry and " retain the said sirname and arms of the family of Mure of " Rowallan."

A subsequent clause, upon which the principal question in the appeal was raised, was thus framed, " And in like manner, " it's hereby expressly provided and declared, and appointed to " be contained in the infeftments to follow hereupon, that in " case it should fall out that there be only one son of this pre- " sent marriage procreate betwixt the saids Master James " Campbell and Lady Jean Boyle, who shall succeed to the " honours and estate of Loudoun, tho' there be daughters, then " and in that case it's hereby declared, that the second son of " this only son of this marriage shall succeed to the said estate " of Rowallan; and failzieing a second son, then the eldest " daughter of this only son is to succeed to the said estate, and " who shall be obliged to marrie and carrie the arms of Row- " allan, in the terms and under the irritancies of the tailzie " @mentioned; but if there be two sons of this present mar- " riage, then the second son is to succeed to the estate of

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" Rowallan, in case the eldest son shall succeed to the estate of " Loudon; and that the succession to the said estate of " Rowallan, in case any of the heirs of this marriage shall suc- " ceed to the estate of Loudon, shall take place according as is " @mentioned, in all time coming; and ,so soon as the son " of this marriage, or others aforesaid, shall accept of the " honours and estate of Loudon, then the rents of the said " estate of Rowallan are to be managed and improven for the " use and behoof of the next heir of tailzie, who shall succeed " to the said estate of Rowallan in manner foresaid, and that at " the sight and by the advice of Alexander Earl of Eglintoun," and several other persons named.

At the date of this contract, the family honours and estates of Loudon were enjoyed by Hugh the third Earl, and brother-german of James Campbell, the destination of the estates by the titles being " in favour of Hugh Earl of Loudoun, and the " heirs-male lawfully procreated or to be procreated between " him and Margaret Countess of Loudoun, his spouse; whom " failing, to the heirs-male to be lawfully procreated of the body " of the said Hugh Earl of Loudoun in any subsequent mar- " riage; whom failing, to any descendant of the body of the " now deceased John Earl of Loudoun," (*i. e.* the 1*st* Earl, Chancellor,) " grandfather of the said Hugh Earl of Loudoun, " whom the said Hugh Earl of Loudoun shall name by a " writing under his hand at any time of his life, and even on " deathbed, with and under such conditions, provisions, restric- " tions, limitations, qualifications, reservations, clauses irritant " and resolutive, or otherwise, as should seem fit to him to insert " therein; and failing such destination being made by the said " Hugh Earl of Loudoun, or the person or persons so to be " named, to the heirs-male descending of the body of the " said deceased John Earl of Loudoun; whom failing, to the " heirs whatsoever descending of the body of the said deceased " John Earl of Loudoun; whom failing, to the heirs whatsoever

" of the said John Earl of Loudoun; whom failing, to the heirs " and assignees whomsoever of the said Earl Hugh."

The Countess of Glasgow never had any sons; and of the marriage of Lady Jean Boyle with Campbell only one son and two daughters were born; both of the daughters died without issue.

In 1773, the son, James M. Campbell, upon the death of his mother, Lady Jean, was served heir to her, and made up a title to the lands of Rowallan under the procuratory in the contract of marriage.

In the year 1782, James M. Campbell became Earl of Loudon, and entitled to the inheritance of the family estates of Loudon, which after the death of Earl Hugh had descended upon his son John, the fourth Earl, by whom they had been conveyed to trustees for payment of his debts. Accordingly, he was served heir-male and of line in general to his predecessor.

In the year 1786, James M. Campbell Earl of Loudon died, leaving an only child, Flora, who, under the destination of the honours and estate of Loudon, became entitled to them in her own right; and, under the contract of marriage of her grandmother, became also entitled to the estate of Rowallan.

In 1787, Flora made up her title to the lands of Rowallan, by service and infeftment, as heir-female of tailzie, and provision under the contract. And in 1790, the surviving trustee of the Loudon estates for payment of debts, conveyed to her such of these estates as remained unsold, which thereby became vested in her in fee-simple. The two family estates were thus united in the person of Flora Countess of Loudon.

In the year 1804, Flora Countess of Loudon married the Earl of Moira. Of this marriage there were born the following children: Lady Flora Hastings, in 1806; Francis George Lord Mauchline, in 1807, who died in the year in which he was born; George Augustus Francis, afterwards Marquis of Hastings, in 1808; Lady Sophia, in 1809; and two other daughters.

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At the period of his marriage the Earl of Moira was possessed of considerable estates situated in England, which were settled upon the Earl for life, with ultimate remainders to the use of his first, second, and other sons successively in tail male, remainder to the Earl, his heirs and assigns. By the settlement made in 1804, upon the marriage of the Earl and the Countess, these English estates were limited to trustees for a term of 100 years, for securing a yearly rent-charge of 1500*l.* for the Countess, and for another term of 3000 years for raising 10,000*l.* for portions for the children of the marriage, other than an eldest son.

In the year 1808, an Act of Parliament was passed, which after reciting the marriage between the Earl of Moira and the Countess of Hastings, and the settlements under which the Earl held these English estates, and that the Earl had charged the lands, under powers in that behalf given by the settlements, with a mortgage-debt of 10,000*l.*, continued thus: "And whereas the "said settled estates comprised in the first schedule," (being the English estates,) "are inconvenient as a family or settled estate, "by reason that they consist for the most part of small and "detached farms and tenements, inconvenient for management "and superintendence, and let at small rents, rendering the "collection of them very expensive, and the said rents are sub-"ject to considerable deductions for repairs of the buildings on "the premises: and whereas the said Flora Mure Countess of "Loudoun is the absolute proprietor in her own right, and by "way of separate estate, of the castle of Loudoun, in the county "of Ayr in Scotland, the ancient seat and residence of her "family, and of divers lands, farms, and hereditaments belong-"ing to the same castle, and forming a very desirable demesne "thereto; but the said lands, farms, and hereditaments are now "subject to or may be affected with or for the whole debts or "engagements of the said Flora Countess of Loudoun and her "predecessors in the said estate, and such castle is a principal

"residence of the said Earl of Moira and Flora Mure Countess "of Loudoun; and it will be a great benefit and advantage to "the issue of the said Francis Earl of Moira and Flora Mure "Countess of Loudoun, and an encouragement to the preserva- "tion of the said castle and the demesnes to be annexed thereto, "that the said castle and certain of the lands, farms, and here- "ditaments, of the said Flora Mure Countess of Loudoun, in "the said county of Ayr, of greater value than the said settled "estates comprised in the said first schedule to this Act "annexed, after allowing for the said mortgage debt of 10,000*l.* "thereon, shall be settled or exchanged for or in lieu of the "same settled estates, and that the said Flora Mure Countess "of Loudoun may take the same settled estate, subject to the "said mortgage debt of 10,000*l.*, as a continuing charge thereon: "but as such exchange or settlement cannot be accomplished "without the aid and authority of Parliament." Upon this recital the Statute enacted, that from and immediately "after "the passing of this Act, so many and such of the manors or "lordships, messuages, farms, lands, tenements, and hereditа- "ments, mentioned and comprised in the said recited indentures "of lease and release or settlement, of the twenty-sixth and "twenty-seventh days of May, 1788," being the English settle- ments, "as are mentioned or enumerated in the said first sche- "dule to this Act annexed, with their and every of their rights, "royalties, easements, members, and appurtenances, and the "reversion and reversions, remainder and remainders, rents, "issues, and profits of all and singular the same premises, shall "be vested in and settled upon the Right Honourable Charles "Lord Kinnaird, and the Right Honourable Charles George "Lord Arden, their heirs and assigns, to the use of the said "Lord Kinnaird and Lord Arden, their heirs and assigns for "ever, discharged of and from all the uses, estates, trusts, "powers, provisoes, and limitations, remainders, charges, decla- "rations, and agreements, by the same indentures of lease and

" release or settlement, and the said indenture of the twelfth day " of July, 1804, limited, expressed, and declared, of and con- " cerning the same manors and other hereditaments, other than " and except the said sum of 10,000*l.* secured to the said " Thomas Coutts, and now due to the said William Collins " Jackson on mortgage, as aforesaid, and the said term of 1000 " years for securing the same; and which sum, together with " the interest thereof, shall from henceforth be and be deemed " a charge on the manors and other hereditaments comprised in " the said first schedule to this Act annexed, as the fund pri- " marily liable to the payment thereof, and such manors and " hereditaments shall be in lieu of and in exchange for the " castle, farms, lands, and hereditaments mentioned in the " second schedule to this Act, and hereby vested in the said " Charles Hope and William Adam, their heirs and assigns, " upon trust, as hereinafter expressed.

" And be it further enacted, that the manors and other " hereditaments comprised in the said first schedule to this Act " annexed, and hereby vested in the said Lord Kinnaird and " Lord Arden, their heirs and assigns, as aforesaid, shall be held " by them, but subject to the said mortgage for 10,000*l.* and " interest, in trust, for such person or persons, and for such " ends, intents, and purposes, and under and subject to such " powers, provisoes, declarations, and agreements, as the said " Flora Countess of Loudoun, at any times or time hereafter, " and from time to time, as well when covert as sole, and not- " withstanding her coverture by her present or any future " husband, by any deed or deeds, or instrument or instruments, " in writing, to be sealed and delivered by her in the presence " of two or more credible witnesses, and attested by the same " witnesses, or by her last will and testament in writing, or any " writing in the nature of or purporting to be her last will and " testament, or any codicil or codicils thereto, to be signed, " published, and declared by her in the presence of three or

" more credible witnesses, and attested by the same witnesses, " shall, either before or after the time at which the exchange " hereby made shall become absolute (but subject nevertheless " and without prejudice to the provision hereinafter contained), " direct, limit, or appoint, and in default of such direction, " limitation, or appointment, and in the mean time, and until " the same shall be made and take effect, and from time to time, " subject to such estates, trusts, charges, or interests, as shall " have been made or created by the said Flora Mure Countess " of Loudoun, then in trust for the said Flora Countess of Lou- " doun, her heirs and assigns, as and for the separate estate of " the said Flora Mure Countess of Loudoun, apart from her " present or any future husband, and free from his contracts, " intermeddling or engagements.

" And be it further enacted, that from and immediately after " the passing of this Act, all and singular the castle, farms, " lands, and hereditaments, mentioned and enumerated in the " said second schedule to this Act annexed, being Loudoun " Castle and part of the estates, together with their rights, " royalties, members, easements and appurtenances, and the " reversion and reversions, remainder and remainders, rents, " issues, and profits of all and singular the same premises, shall " be absolutely freed and discharged of and from all the present " estate, right, title, interest, claim, and demand of her the said " Flora Mure Countess of Loudoun, and her heirs, and be " vested in and settled upon the said Charles Hope and William " Adam, their heirs and assigns, upon trust, to convey, settle, " and assure the same, to and for such uses and estates, and " under and subject to such charges (other than and except the " said mortgage debt of 10,000*l.*, and the interest thereof, and " the said term of 1000 years for securing the same,) as would " at the time of such settlement, by virtue of the several herein- " before recited indentures or any of them, have been subsisting " of and concerning the said manors, farms, lands, and heredita-

" ments comprised in the said first schedule to this Act annexed, " in case this Act had not passed, or as near thereto as the laws " of Scotland and the deaths of parties and other circumstances " will admit.

" Saving always to the King's Most Excellent Majesty, his " heirs and successors, and to all and every other person and " persons, bodies politic and corporate, his, her, or their heirs, " successors, executors, administrators, and assigns (other than " and except the said Francis Earl of Moira and Flora Mure " Countess of Loudoun, his wife, respectively, and their respec- " tive heirs and assigns, and the first and other sons of the " said Francis Earl of Moira, and the heirs-male of the respec- " tive bodies of the same sons and the daughters and younger " sons, for whose portions the sum of 10,000*l.* hath been " appointed as aforesaid, and the said Charles Hope and Wil- " liam Adam, and Sir Thomas Hutton and Joseph Hill, as " trustees of the said several terms of one hundred years and " three thousand years, appointed to them respectively as " aforesaid, and their respective executors, administrators, and " assigns, and the said William Adam, his heirs and assigns, as " trustee of the inheritance conveyed to him and them by the " said Elizabeth Countess Dowager of Moira, in remainder or " reversion as aforesaid), all such estate, right, title, interest, " claim and demand of, in, to, or out of, the hereditaments men- " tioned in the said several schedules to this Act annexed, or " any of the same hereditaments, or any part thereof, as they, " every or any of them, had before the passing of this Act, or " could or might have had, held, or enjoyed, in case this Act " had not been made."

While this statute was being passed, the Earl of Moira granted the following obligation as explanatory of the intentions of himself and the Countess:—" I, Francis Earl of Moira, Lord " Rawdon, considering that, in case the Bill now depending in " Parliament, for exchanging part of my settled estates in

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" England for part of the estates of Flora Mure Countess of " Loudoun, my spouse, in Scotland, shall pass into a law, the " said estates now of the said Countess will be settled to the " like uses as my said estate now stands settled; and consider- " ing that, as I am entitled to the reversion in fee of the said " last-mentioned estate upon the failure of issue-male of my " body, and will, of consequence, have the same right and " interest in the estate of the said Countess which is to be given " in exchange; and it's my will and intention that, in case of " the failure of issue-male of my body, the said estate should go " and descend to the said Countess and her right heirs succeed- " ing to her title and dignity, and not to my own right heirs if " they should be different; I do, therefore, hereby bind and " oblige myself, as soon as the said estate now belonging to the " said Countess, and proposed to be exchanged as aforesaid, is " settled in pursuance of the Act so expected to pass, to make, " execute, and deliver such deed or deeds, as by the Right " Honourable Charles Hope and William Adam, Esq., the " trustees named in the said Bill, or either of them, shall be " judged necessary and proper for carrying my said purpose and " intention into effect: And I consent that the said estate now " of my said wife shall, if that is practicable and judged proper, " be immediately and directly settled, failing me and the heirs- " male of my body, upon her and her right heirs succeeding to " her dignity, in and by the deeds which, by the said proposed " Act, are directed to be framed and executed at the sight or by " the direction of the Court of Session, provided, nevertheless, " that in any conveyance or settlement of the said estate to " effectuate my said intention, the same shall be declared subject " to and charged with all and every sum and sums of money, " being the proper debts of the said Flora Mure Countess of " Loudoun, which shall be discharged out of the proceeds of " my said estate proposed to be settled on her by the said Bill " or otherwise by me out of my separate estate and effects, in

" such way that the amount of the said debts, in the case of the " right heir of the said Countess being different from my right " heirs, and becoming entitled to the estate which was hers, " shall be payable to my said heirs by hers; and I hereby " empower the said Charles Hope and William Adam, or either " of them, and the survivor of them, and the heirs of the sur- " vivor, to sue, if necessary, for implement of this obligation, " and to exhibit the same to the Court of Session, and otherwise " to do as to them shall seem proper, so as that my declared " purpose may be carried into execution."

Proceedings were afterwards adopted for completing an entail of the estates of Loudon, in terms of this Act of Parliament, and in June, 1809, the Countess, with consent of the statutory trustees and of the Earl, executed a deed, which after reciting the Acts of Parliament, continued thus: " Now seeing " that the lands and estates comprised in the said second " schedule to the said Act, and hereinafter particularly con- " veyed, are now exonerated of all the debts and engagements " of me the said Flora Countess of Loudoun, and my prede- " cessors, affecting the same at the time of passing the said " Act, or made to affect the same within the time thereby " limited and now elapsed, and in order to charge and burden " the same agreeable to the law and forms of Scotland, as " effectually as the estates in England intended to be exchanged " stood charged at the time of passing the said Act, (excepting " the said mortgage debt of 10,000*l.*, which is, in terms and by " the provisions of the said Act, to remain a charge upon the " said English estates), I am now, in manner after mentioned, " to convey the said lands and estate in said second schedule, " burdened with the payment of 1500*l.* sterling yearly of join- " ture to me, to take place in the event of the decease of said " Earl of Moira, and my surviving him during my life, and in " bar of terce or dower, and also charged with the payment of " 10,000*l.* sterling, as a provision for the younger children of

"the marriage between my said husband and me, in terms of "said marriage-settlement, and to come in place of the charge "for the same sum thereby created upon the English estate; "and I the said Francis Earl of Moira, being desirous and "consenting, as is testified by my subscribing these presents, "that the share, right, and interest which I had in the English "estate, termed the reversion in fee, and which, according to "the terms of the said Act of Parliament, I am entitled to have "and hold in the Scotch estate, should nevertheless go to and "be invested in the said Flora Mure Countess of Loudoun, and "her heirs hereinafter mentioned, in as far as the said purpose can "be effectuated according to the law of Scotland; and I the said "Countess being willing and desirous to comply with the obli-"gation I am under by the said Act, with regard to conveying "the said lands and estates comprised in the second schedule "to the said Act, and hereinafter mentioned, to the same uses "and estates, and under and subject to such charges (other "than and except the said mortgage debt of 10,000*l.*, and "interest thereof,) as, by virtue of the several indentures in the "said Act, and herein recited, would have been subsisting of "and concerning the said manors, farms, lands, and heredita-"ments comprised in the first schedule annexed to the said "Act, in case the said Act had not passed, or as near thereto "as the laws of Scotland, and the deaths of parties and other "circumstances, and the change of intention with regard to the "said reversion, will permit." The Countess then disponed the castle and part of the Loudon estates, "to and in favour "of the said Francis Earl of Moira, and failing him by decease, "to and in favour of George Augustus Rawdon, commonly "called Lord Mauchline, eldest, and at present the only son of "the marriage between the said Francis Earl of Moira and me "the said Countess, and the heirs-male of the body of the said "George Augustus Francis Rawdon, Lord Mauchline; whom "failing, to the second, third, fourth, and every other son, in

" the order of their birth, to be born of the said marriage " between us the said Earl and Countess, and heirs-male of " their bodies in their order, respectively and successively; " whom failing, to the first and other sons of the body of the " said Francis Earl of Moira, to be born of any other marriage " he may subsequently lawfully contract and enter into, according " to the order of the birth of the same sons, and the heirs-male " of their bodies in their order, respectively and successively; " whom failing, to me the said Countess, and the heirs succeeding " to me in the title and dignity of Loudoun; whom failing, to " the heirs and assigns whatsoever of me the said Countess." This conveyance was under the burden of the jointure of 1500*l.* provided to her, and of the sum of 10,000*l.* for provisions to the younger children, and under the restrictions and prohibitions and clauses irritant and resolutive, of a strict entail; and also " with and under this power and faculty, as it is hereby " expressly provided and declared, that it shall be competent to " and in the power of the said Francis Earl of Moira, with the " consent, concurrence, and approbation of the said George " Augustus Francis Lord Mauchline, when of the full age of " twenty-one years, or, in case of his death, with the consent, " concurrence, and approbation of the next immediate heir of " tailzie descended of the body of the said Earl, being of the " age of twenty-one years, and who, in the event of his sur- " viving the said Earl, must succeed to him in the said lands " and estate, by a proper and formal deed duly executed by the " parties thereto, according to the forms of the law of Scotland, " to alter this entail, and to dispone and convey the said entailed " lands and estate, to the said Francis Earl of Moira, or to any " other person or persons that may be thought proper, and that " either in fee-simple, or with such conditions, provisions, limi- " tations, restrictions, and clauses irritant and resolutive, or " upon trust for such uses and purposes as the parties to such " deeds may think proper; and, in like manner, after the

" decease of the said Francis Earl of Moira, and in case no " deed of alteration has been by him executed during his " life, with the consent and approbation as aforesaid, it shall " be in the power of the said George Augustus Francis " Lord Mauchline, and of the other heirs of tailzie aforesaid, " descendants in the male line of the body of the said Francis " Earl of Moira, and of each and every one of them, when they " shall have respectively completed their titles by infeftments " to the said entailed lands and estate, agreeable to and in " terms of these presents, and shall have attained the age of " twenty-one years complete, to alter this entail, and to convey " the said entailed lands and estate, by proper deeds, in the " same way and manner, and as fully and freely in all respects, " as is before provided that the said Francis Earl of Moira, with " the consent, concurrence, and approbation aforesaid, may do " in his lifetime; as also, that it shall be competent to the said " Francis Earl of Moira, with the consent of any of the sub- " stitute heirs of entail, descendants of his body, when of the " full age of twenty-one years, to alter this entail, and the order " of succession with respect to the said substitute consent- " ing, and with respect to all other substitutes postponed to " him by this present deed, whether descendants of the said " consenting substitute or not, and of new to arrange, destine, " and disbute, or altogether defeat, such contingent succession, " as to them shall seem meet; but whereas these powers and " faculties are hereby committed exclusively to the personal " discretion of the said Francis Earl of Moira, George Augustus " Francis Lord Mauchline, and the substitute heirs above men- " tioned respectively, it is hereby provided and declared, that " the same being of course incapable of transmission by grant, " purchase, adjudication, or otherwise, must be exercised freely " and voluntarily, and in a manner suitable to the powers con- " ferred by the said settlement by indenture of lease and release " of Francis Earl of Huntingdon; and, therefore, that no deeds

" executed in carrying them into execution shall be effectual, or " in any respect operate an alteration of these presents, until a " decreet is obtained in the Court of Session, in a procees " where the whole heirs and substitutes alive at the time are " called as defenders, declaring the deeds executed for the pur- " poses aforesaid, to be lawful exercise of the powers and faculties " hereby conferred; the meaning and intent of this proviso and " declaration being, that the said Francis Earl of Moira, and " the said George Augustus Francis Lord Mauchline, and the " other issue-male of the said Earl's body, shall, as far as the " forms of the law of Scotland will admit, have the like powers " over the said lands and heritages hereby disponed in their " order, as he or they had or might come to have over the said " lands and estate in England, according to the settlements " thereof recited in the said Act of Parliament, if the said lands " and estate in England had remained under the said settle- " ments, so as to defeat the entail thereof in future, and bar the " remainders or right of substitutes."

By an Act passed in the year 1813, the remainder of the Loudon estates was exchanged for other English estates, held by the Earl under the same settlements as the lands embraced by the Act passed in 1808.

This Act recited that the lands to be affected by it were convenient to be enjoyed along with the other lands affected by the prior Act, and were of greater value than the lands of the Earl for which they were to be exchanged; and enacted, that from the date of its passing, the English estates should be vested in Lords Kinnaird and Arden, " their heirs and assigns " for ever, discharged of and from all the uses, estates, trusts, " powers, provisoes, and limitations, remainders, charges, decla- " rations, and agreements, by the same will of the said Francis " Earl of Huntingdon, limited, expressed, and declared of and " concerning the same hereditaments; and such hereditaments " shall be in lieu of and in exchange for the farms, lands, and

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"hereditaments, mentioned in the second schedule to this Act "annexed," being the Loudon estates, "and hereby vested in "the Right Honourable Charles Hope, President of the Court "of Session in Scotland, and William Adam, Esq., their heirs "and assigns, upon trust, as hereafter expressed." It then enacted that the English lands so vested in Lords Kinnaird and Arden should remain, "continue, and be to the use of such "person or persons, and for such ends, intents, and purposes, "and under and subject to such powers, provisoes, declarations, "and agreements, as the said Flora Mure Countess of Loudoun, "at any time since the 5th day of March, in the year 1813, and "before the passing of this Act, and notwithstanding her "coverture by her present husband, hath directed, limited or "appointed, or at any time or times hereafter, and from time to "time, as well when covert as sole, and notwithstanding her "coverture by her present or any future husband, shall direct, "limit, or appoint, by any deed or deeds, or instrument or "instruments in writing, already or hereafter to be sealed and "delivered by her, in the presence of two or more credible "witnesses, and attested by the same witnesses, or by her last "will and testament in writing, or any writing in the nature of "or purporting to be her last will and testament, or any codicil "or codicils thereto, already or hereafter to be signed, published, "and declared by her, in the presence of three or more credibile "witnesses, and attested by the same witnesses (but subject "nevertheless and without prejudice to the provision herein-"after contained); and in default of such direction, limitation, "or appointment, and in the meantime, and until the same "shall be made and take effect, and from time to time subject "to such estates, trusts, charges or interests, as shall have been "made or created by the said Flora Mure Countess of Loudoun, "her heirs and assigns, then to the use of the said Charles Lord "Kinnaird and Charles George Lord Arden, their heirs and "assigns for ever, in trust for the said Flora Mure Countess of

"Loudoun, her heirs and assigns, as and for the separate estate "of the said Flora Mure Countess of Loudoun, apart from her "present or any future husband, and free from his contracts, "intermeddling or engagements, and also discharged from all "right of the said Francis Earl of Moira to be tenant by the "courtesy of England."

It then enacted that the Loudon estates should be "absolutely freed and discharged of and from all the present estate, "right, title, interest, claim, and demand of her the said Flora "Mure Countess of Loudoun, and her heirs, and be vested in "and settled upon the said Charles Hope and William Adam, "their heirs and assigns, upon trust, to convey, settle, and "assure the same to and for such uses and estates, and under "and subject to such charges as would at the time of such "settlement, by virtue of the said will of the said Francis Earl "of Huntingdon, have been subsisting of and concerning the "said farms, lands, and hereditaments comprised in the said "first schedule to this Act annexed, in case this Act had not "passed, or as near thereto as the laws of Scotland, and the "deaths of parties, and other circumstances, will admit," and directed that the proper deeds should be executed for effecting the purposes intended, and contained the same saving clause as was in the Act of 1808.

On the 27th of January, 1815, commissioners of the Earl and Countess of Moira executed an entail having this recital: "Now seeing that the lands and estate comprised in the "said second schedule to the said Act, and hereinafter particularly conveyed, are now exonerated of all the debts and "engagements of the said Flora Countess of Loudoun and her "predecessors, affecting the same at the time of the passing of "the said Act, or made to affect the same within the time "thereby limited, and now elapsed, and in order to settle the "same agreeable to the laws and forms of Scotland, as effectually as the estates in England intended to be exchanged,

"stood settled at the time of passing the said Act." The entail then conveyed the lands embraced by the second Act "to and in favour of the said Francis Earl of Moira, and failing him by decease, to and in favour of George Augustus "Francis Rawdon, commonly called Lord Hungerford, at present "the eldest son of the said Francis Earl of Moira, and the "heirs-male of the body of the said George Lord Hungerford; whom failing, to the other heirs-male of the body of "the said Francis Earl of Moira, in the order of their birth, and "the heirs-male of their respective bodies; whom failing, to "such person or persons as the said Francis Earl of Moira has "nominated and appointed, or shall nominate and appoint, by "any deed or deeds under his hand, to succeed on such failure "of the heirs-male of his body, to the said lands and estates "hereinafter disponed, or who shall be so nominated and "appointed by any commissioner or commissioners of the said "Francis Earl of Moira, already empowered, or hereafter to be "empowered, so to do, by a deed or deeds under his hand, and "failing such appointment and nomination, to the person or "persons who, in case the said recited Act of the 53rd of His "present Majesty's reign had not passed, would, on the decease "of the said Francis Earl of Moira, and failure of issue-male of "his body, have been entitled to the English estates mentioned "and comprised in the first schedule to the said last mentioned "Act annexed, under the denomination of the said Francis Earl "of Huntingdon's own right heirs; whom failing, to the heirs "whatsoever of the said Francis Earl of Moira," under the fetters of a strict entail, with the same power of alteration as was given by the prior entail of 1808.

Feudal titles were made up in the person of the Earl of Moira under both of these entails by crown charter and infeftment. And subsequently to the excambion effected under these Acts of Parliament, the English estates were sold, and with the purchase money the debts of the Earl were paid off.

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In the year 1826, the Earl of Moira, now become Marquis of Hastings, died, and was succeeded by his son George Augustus Francis, who made up his titles to the Loudon estates as heir of entail and provision under the two entails by service and infeftment.

In the year 1839, Flora, the eldest daughter of the Marchioness of Hastings, died. In 1840 the Marchioness died, leaving of her children surviving her, George Augustus Francis, now Marquis of Hastings, and three daughters, the eldest of whom was the Appellant, Lady Sophia Frederica, Marchioness of Bute. And at the period of her death her son, the Marquis of Hastings, had one son, the Respondent, Paulyn Reginald Serlo, then Earl of Rawdon, and three daughters, of whom the eldest was the Appellant, Lady Edith Rawdon Hastings.

Claims to the Rowallan estates having been asserted on behalf of the Marchioness of Bute and Lady Edith Hastings, on the ground that George Augustus Marquis of Hastings, having succeeded to the Loudon estates, could not likewise take the Rowallan estates, but was debarred therefrom by the terms of the settlement on the marriage of James Campbell and Lady Jean Boyle, it was arranged that the Marquis should make up a title by service as heir of tailzie and provision to his mother the Marchioness of Hastings, and that these claims should be tried by actions of declarator at the instance of the respective parties. Accordingly George Marquis of Hastings made up a title in this form, and then brought an action in 1841, concluding to have it found that he had not *succeeded* to the Loudon estates in the sense in which the term was used in the entail of Rowallan—that he had right to the Loudon estates in satisfaction of his right to the English estates under the settlements thereof, which right he had not by succession, but as a purchaser, and consequently the clause of devolution in the entail of Rowallan had no application, and would not prejudice

his right to enjoy that estate; or at least that that clause did not affect his right to succeed as heir of entail in Rowallan, and did not impose any obligation upon him to denude thereof in favour of any other descendants of the marriage; or otherwise, that the right to succeed under the entail of Rowallan belonged to him, and after his death to his eldest son, or to his second son if he should leave such, and failing a second son, to his eldest daughter, and that such son or daughter was not entitled by virtue of the clause of devolution to question his right of succession, or require him to denude thereof, and that the title made up by him was good and indefeasible.

The Appellant, the Marchioness of Bute, likewise brought an action, setting forth that her brother, George Augustus Marquis of Hastings, having succeeded to the lands and honours of Loudon, the right of succession to the lands of Rowallan under the entail thereof had devolved upon her, and concluding to have that found, and her brother ordained to denude in her favour; or otherwise, that the titles made up by him should be reduced and set aside.

Again, Lady Edith Hastings brought an action, setting forth that as her father, George Augustus Marquis of Hastings, had, succeeded to the honours and estates of Loudon without having a second son, she, as his eldest daughter, was entitled to succeed to Rowallan under the entail of that estate, under an obligation to denude in the event of her father afterwards having a second son, and concluding to have it found that her father had no right to succeed to Rowallan—that the Marchioness of Bute had no right to succeed thereto—that her father having only one son, she, as his eldest daughter, was entitled to succeed to these estates, and that they had devolved to her as heir under the contract of marriage, or at least that she would be so entitled in the event of a second son not being born to her father, and that in the meanwhile the rents of the lands should be managed and improved for behoof of

such second son, if such there should be, and failing him, for herself.

After these different actions had been conjoined, and while they were still in dependence, a second son, Lord Henry Hastings, was born to the Marquis. In the year 1842 an action was brought in the name of Lord Henry, setting forth that he, as the second son of his father, was entitled to succeed to Rowallan in consequence of his father having succeeded to the estates and honours of Loudon, and concluding for a declarator of this right, with other consequential conclusions.

This last action was followed by a second action at the instance of Lady Edith, to have it found that her right to succeed to Rowallan vested on the death of Flora Marchioness of Hastings, at which period her father had no second son, and that her right was not affected by the subsequent birth of Lord Henry Hastings.

These two new actions were conjoined with the previously depending ones. Subsequently George Augustus Marquis of Hastings died, and was succeeded in his titles and estates by the Respondent, Paulyn Reginald Marquis of Hastings, who was sisted as a party to all these actions.

The Court ordered cases for the parties to be prepared, and laid before all the Judges for their opinion, and thereafter, on the 16th November, 1844, in conformity with that opinion, pronounced the following interlocutor:—"Find that the deceased "George Marquis of Hastings was entitled to succeed to, and "complete feudal titles to, the estate of Rowallan at the death "of his mother, the late Countess Marchioness, as heir of taillie "under the Rowallan entail, and that his right was not excluded "by the clause of exclusion or devolution in the said entail, in "terms of the first declaratory conclusion of the summons at "the instance of the late Marquis; and, in respect thereof, "Find that the present Marquis of Hastings, the eldest son of "the late Marquis, is now entitled to succeed to, and possess,

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"the estate of Rowallan, as nearest and lawful heir of taillie and "provision to his father, and has the sole right and title to the "said estate: And, *separatim*, Find that the clause of exclusion "or devolution, according to its sound construction, did not "apply to, or affect, the late Marquis, and did not exclude him "from the succession to the said estate of Rowallan: There-"fore, in the action originally raised in the name of the late "Marquis, and now insisted in by the present Marquis, decern "and declare to the effect foresaid, in terms of the first and "fourth conclusions of the summons, and repel the whole "defences of all the defenders thereto: And in the counter "actions at the instance of Lady Sophia Hastings, Lord Henry "Hastings, and Lady Edith Hastings, respectively, sustain the "defences of the late Marquis of Hastings, and assoilzie the "present Marquis of Hastings from the conclusions of all these "counter actions."

The appeal was taken against this interlocutor by the Marchioness of Bute, Lady Edith Hastings, and Lord Henry Hastings, who had a common interest in maintaining against the Marquis of Hastings, *first*, that the shifting or devolution clause in the contract of marriage, 1720, was so framed as to be applicable to and take effect against not only the sons of the marriage, but the whole series of heirs called by the contract upon these terms in the later branch of the clause, "and that "the succession to the said estate of Rowallan, in case any of "the heirs of this marriage shall succeed to the estate of Lou-"don, shall take place according as is above mentioned in all "time coming." And *second*, that the clause had come into operation, (by the Marquis of Hastings having come into possession of both Rowallan and the Loudon estates,) under the words in the first branch of the clause, that in case there should be a son of the marriage "who shall succeed to the honours and "estate of Loudon," then it was declared that the second son of that son "shall succeed to the said estate of Rowallan."

But each of the Appellants had a distinct interest in maintaining against the others a *third* question, that if the clause had in the circumstances come into operation, it had done so in favour of the individual Appellant, and not of the others.

In consequence of the conflicting interests of the Appellants under the *third* of these questions, each Appellant was allowed to be heard separately by his counsel, and very elaborate arguments followed upon all the three questions. But the *second* was the only one upon which the House delivered an opinion, and therefore is that to which the subsequent statement will be confined.

Lord Advocate and *Mr. Bethel* for the Marchioness of Bute. —If the shifting or devolving clause by its terms applies to the Marquis of Hastings, the circumstances under which he took the barony and estates of Loudon are not such as to free him from its operation. When the Countess of Glasgow framed that clause in the contract of marriage, she contemplated the possibility of the succession to the estate of Rowallan, and to the honours and estates of Loudon, uniting in the same person. To prevent that union, in whatever way it might be accomplished, and in case any of the heirs of the marriage should become possessed of the Loudon estates, to make Rowallan pass to another and inferior line of heirs, was the object she had in view.

The effect of the arrangement accomplished by the Acts of Parliament, was merely to substitute the Loudon estates under the settlement in tail of the English estates, and to set the English estates free from that settlement for the purposes of sale. But the mode in which that was done by the first Act was to make the lands embraced by it, after serving the uses of the English settlement, descend, not, as the English lands would have done under the settlement in tail, to the heirs of Lord Hastings, but as the Loudon estates would have done under their titles before

being so substituted, viz., to the heirs of the Marchioness. If, then, the present Marquis would have been affected by the shifting clause if he had taken the lands of Loudon after successive descents in fee simple, how can he be less so, because the Marchioness of Hastings did not allow them to descend in fee simple, but sent them down under a special form of entail? With reference to the intention of the settlor, that the two estates—Rowallan and Loudon—should not be united, it is equally violated in the one case as in the other. With respect to the honours of Loudon, the case is quite clear that the settlor intended to prevent them being held by the owner of Rowallan.

[*Lord Campbell.*—If the lands of Loudon had been alienated, and the honours alone had descended upon an heir of the marriage, you do not mean to say that, in that case, Rowallan could not have been taken?]

That case does not arise. Not only is the intention of the settlor violated, but so are the terms used by her to express that intention. In common and ordinary parlance, the Marquis of Hastings *succeeded* to the Loudon estates as first tenant in tail under the Act of Parliament substituted for the English settlements. The term "*succeed*" is not used by the settlor in any other sense than this popular one.

As far as regards *the honours* of Loudon, the case is free from all doubt, as unquestionably the Marquis did *succeed* to them in the strictest sense of the word. But it is said the clause does not apply, because he did not *succeed* to both, to the estate of Loudon as well as the honours, in the meaning in which "succeed" is used in the settlement. But the very clause in question uses that word in reference to the case both of a different transmissibility and a different order of succession.

What the Acts of Parliament effect is to substitute Loudon for the English estates, and make it be taken under the trusts of the English settlement. How can this render inoperative the destination in a given event which is assigned to Rowallan?

Why is anything which the heirs of Loudon might do in regard to Loudon to defeat what the owner of Rowallan had provided in regard to taking Rowallan? But, if this could be said, the saving clause in the statute must enure for the benefit of the owners of Rowallan, and prevent the destination of that estate from being in any respect impaired or qualified by the Act. If the Marchioness of Hastings had herself made a settlement of the Loudon estates, under which the present Marquis took, would he not with propriety, under the terms of the settlement of 1720, be said to succeed to Loudon, although something might have been given to the Marchioness in lieu of the settlement she had made?

[*Lord Chancellor.*—He was tenant in tail of the English estates subject to his father's life interest, and by the Act he gives up these estates for Loudon, so that he purchased the Loudon estates by his own estates. The Loudon estate being at the disposal of the Marchioness, she settled it. She might have sold it in the market for what it would fetch.]

All that was done, was to transfer to Loudon the particular foree of limitation of the English estates, or to make an exchange of the one for the other, the effect of which is merely to give the party the same kind of interest in, and benefit from, the estate taken in exchange, as he had in the estate given. The arrangement in fact amounts to a settlement of the Loudon estates by the Marchioness of Hastings, under which the present Marquis may as justly be said to succeed as under the settlement of Rowallan. But after the destination of Rowallan had received a certain character and quality, by the possibility of its ownership being conjoined with that of Loudon, any subsequent alteration in the ownership of Loudon was immaterial to affect the destination of Rowallan.

If the entail of Rowallan had been made in the year 1600, in the year 1700 an Earl of Loudon had sold Loudon, in 1720 another Earl had bought it back, and in 1820 Loudon coming

by descent from the Earl who purchased it back, vested in the same person as the heir of Rowallan, would this person not have *succeeded* to Loudon in the meaning in which the term is used in the entail of Rowallan?

The present Marquis was an infant at the date of the Act of Parliament, and a great many years afterwards he succeeds to Loudon as tenant in tail.

[*Lord Campbell.*—At the date of the Act he had a vested estate tail in the English estates, subject to his father's liabilities, which he gave up upon the Loudon estate being conveyed to his father. The effect of the Act I presume was the same as if the infant, having been of age, had actually been a party to the docking of the entail, and making a new settlement.]

There could not be any distinction, for the legislature in dealing with the rights of the infant acted for him. The Act must be treated for this purpose as a mere conveyance. But how is it to affect Lady Glasgow's entail of Rowallan? To her it was matter of indifference how Loudon was dealt with, or by what means it was carried down; all she had in view was its union in the same person as the possessor of Rowallan.

Fazakerly *v.* Ford, 1 *Ad. & Ellis*, 897, is supposed to be an authority against the Appellants, but there the clause made express reference to the title under which the estate was "to "devolve,"—it was expressly under a specified will, and as it did not come by the will, to have made the shifting clause take effect, could only have been accomplished by doing violence to its express terms. But that case is an authority for an enlarged meaning of the word "succeed," for there the Vice-Chancellor held "devolve" to mean "a taking in succession by virtue of "the limitation."

Sir F. Kelly and *Mr. D. Mc Neill* were heard to maintain the same arguments upon this branch of the case on behalf of Lord Henry Hastings, and

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Mr. Stuart and *Mr. Moir* on behalf of Lady Edith Hastings.

Mr. G. Turner and *Mr. Adam Anderson* were heard in answer for the Marquis of Hastings, and

The Lord Advocate in reply.

LORD CHANCELLOR.—It appears to me to be unnecessary to advert to more than one of the many points which have been raised in this case, and which have been argued with great learning and ability at the bar. If the event has not happened upon which it was provided by the deed of entail, that the Rowallan estate should shift from the proposed successor to some other person, the title of the present Marquis cannot be impeached. This is purely a question of intention, to be collected from the instrument itself. In this, as in all other cases, the words used are to be understood in their natural and usua sense and signification, unless an intention be apparent to give to them an unusual and particular meaning. In either case the intention is the object to be sought, and if it be sufficiently apparent, it will govern. Upon this principle the case of Taylor *v.* Earl of Harewood, in 3 *Hare*, 372, was decided.

On the part of the Appellants much objection was taken to what was said to be an improper use of a technical meaning of the word "purchase" in the English law, in which sense alone it was said that the late Lord Hastings could be treated as a purchaser of the Loudoun estate. But it appears to me that a much more confined and inadmissible use has been made of the technical expression, "succeeding," used in Scotch entails, for it appears to me that the late Lord Hastings was not only a technical but an actual purchaser; but that he was rather a technical, not an actual successor to those estates, in the sense in which that term is used in the entail. But the terms themselves must decide this. The entail provides, if there be only

one son, who shall *succeed* to the *honours* and estate of Loudoun, then the second son of such only son shall *succeed* to Rowallan. If there be two sons, then the second son is to *succeed* to the estate of Rowallan, in case the eldest shall succeed to the estate of Loudoun. And the succession to the estate of Rowallan, in case any of the heirs of the marriage shall succeed to the estate of Loudoun, shall take place according as is above mentioned in all time coming. And as soon as the son of this marriage, or others aforesaid, shall accept of the honours and estate of Loudoun, the rent of Rowallan shall be improved for the use of the next heir of tailzie who shall succeed to Rowallan.

The contract matrimonial was between the heiress of the estate of Rowallan and the heir expectant of the honours and estate of Loudoun. If it had been intended that no heir of Rowallan under the entail should hold the honours and estate of Loudoun, how easy would it have been to have said so; instead of which the shifting is to take place upon certain events only, so little comprehending all possible events, that in two generations both estates have been enjoyed by the same person. There is, therefore, no general intent manifested, to effectuate which violence ought to be done to the expression used. The question is merely what is the natural meaning of the words used, and do they, or do they not, include the particular circumstances which have happened?

To ascertain this, we must place ourselves in the position of the parties at the time the entail was created. They will prove that, as to Rowallan, those who would enjoy Rowallan would be parties entitled under the entail then created; and, as to Loudoun, they must have contemplated that the same persons were likely to become heirs of those honours and estates. When, therefore, the entail speaks of succession, the natural meaning of that expression would be succession under the then existing titles of those estates. But this is not left to depend upon the natural meaning of the terms used—for every

expression used proves that to have been the actual meaning of the parties. The succession is to the honours *and* estate, and the word is used repeatedly as applicable to Rowallan and Loudoun—but as to the honours, and as to Rowallan, the succession intended must have meant succession under the then existing or created estate and limitation. Its meaning as to the Loudoun estate must therefore be the same, there being no words used, or reasons apparent, for giving a different meaning to the word used as applicable to the different subjects to which it refers.

The meaning of the whole, therefore, is, if the existing expectancy of succession to the honours and estate of Loudoun shall be realized in the heir of the marriage, then in certain events Rowallan shall shift to certain other heirs of tailzie. It is not necessary to consider what variations in the course of succession might have come within the provision, as the title of the present Marquis is not in any respect under it. That succession in the person of Flora Marchioness of Hastings, became subject to her control, and she exercised her right by absolutely destroying it. It was through her that the late and present Marquis are connected with the house of Loudoun, and succeeded to its honours. But it is not through her that the late or present Marquis succeeded to the estate of Loudoun, but in the technical meaning of the term "succeed" in the Scotch law, through the first Marquis of Hastings, a stranger, which succession took place in the life-time of the late Marquis's mother.

Now, then, can this be a succession within the meaning of that expression in the entail, which must have meant a succession as heir of the house of Loudoun? Suppose Flora Marchioness of Hastings had, before the marriage with Lord Moira, sold the Loudoun estate, and that Lord Moira had afterwards purchased it, and that it had descended from him to the late Marquis, would that have been the succession contemplated by

the deed of entail? But the present case is stronger, for the purchase was by the late Marquis, and paid for by his property. That estate being the only property applicable to that purpose, has been devoted to meet the debts and engagements of the family. The machinery by which that was effected cannot alter the results. It might have been sold to a stranger, and the proceeds applied, or it might have been sold at public auction, and bought by those interested in the English estate. The same thing was effected by the two Acts of Parliament. In all such cases the succession contemplated by the entail would have been destroyed, and whatever title the late or the present Marquis might have obtained in the land which constituted that property, would have been distinct from, and foreign to, and independent of, any hope of succession which at one time existed in them as descendants of the house of Loudoun.

It appears to me clear upon this point, that the event which has happened is not within the provision of the deed of entail, and that the interlocutor must be affirmed.

LORD BROUGHAM.—This case, my Lords, which is one of very great value, and also of importance as regards the argument which has been maintained on either side respecting the import of the clause in the nature of a shifting or devolving clause in this settlement, has been argued with great ability and learning on both sides of the bar by the various parties before us; and it has been argued at very great, but I will not say needless, length, and is now presented for the decision of your Lordships, with all the benefit and assistance which the Court can derive from this elaborate argument at the bar.

We have considered this case both since the argument at the bar and during the course of that argument, and especially immediately at its close. I mean those of us who heard it, including my noble and learned friend who is accidentally not here present, but who throughout has come to the same view of

the argument, and authorizes my noble and learned friend to state for him that he has come to the same conclusion, as he did indeed during every one of the arguments, in which we also, who are now here present, concur. The result is, that the construction put by the majority of the Judges in the Court below, who were all consulted upon it, is the right one, and that the decree appealed from must be affirmed.

I begin by stating that I rest not my opinion at all upon the view of the case which has been sometimes taken, and was even, to a certain degree, adopted on the part of the Respondent at the bar, at all events, it was dealt with in the argument to rebut that on the part of the Appellant, that we are here in a question of forfeiture, and that we are therefore to apply to the construction of the alleged clause of forfeiture, those very strict rules of interpretation which are applicable to cases of forfeiture. I regard this, no doubt, as a devolution, or shifting clause, as we call it in this part of the island, but I do not regard it in the light of a forfeiture, but rather in the light of a modification impressed upon the destination. I regard it as governing the destination, and not in the light of a forfeiture; at least, it is not at all necessary to my view of the subject, and to support that view, that it should be regarded as a forfeiture, and that the strictness of construction applicable to cases of forfeiture should be adopted in this case. But, regarding it merely in the light of a clause governing the destination, I am to look at the meaning of the words in the early part of the clause, "who shall "succeed to the honours and estate of Loudoun;" and going on in the two subsequent limbs of the clause, "shall succeed to the "estate of Rowallan;" and again, "is to succeed to the said "estate;" that is in the clause ordering the arms and name to be retained; and, ultimately, the more important of the whole, upon which chiefly the argument now turns, that "the succes- "sion to the said estate of Rowallan, in case any of the heirs of "this marriage shall succeed to the estate of Loudoun, shall

"take place according as is above mentioned in all time coming." Therefore the case resolves itself into this question, and the argument, in truth, is confined within these very narrow limits, what construction are we to give to the words "succeed" and "succession?"

Now, I think, first of all, that taking the word in its common use, in common parlance it would be doing no little violence to that ordinary sense and acceptation of the term, if under the words "succession" and "succeed" we were to include (and yet the argument of the Appellant, and of Lord Moncrieff requires it,) every manner of way and any manner of way in which a party or an heir could take or become possessed of an estate. That is not the ordinary meaning of the term; "succeed," in its ordinary sense, unless qualified by the context, or further explained by some antecedent or some subsequent expression, must be taken to convey the idea of one particular mode of succeeding, of taking, of becoming possessed, that is a succession (I fall naturally into the word, for it is the word which naturally occurs to one as expressive of the thing); it means inheriting; it means taking, not as a purchaser at all.

I observe that my Lord Moncrieff, in his argument, is impressed with this idea of it, for in one case he comes to speak of "succeeding in the estate of the family;" but "in the estate "of the family" can only be meant to qualify and explain the expression, for it is to be one particular kind of succession rather than any other, and to the exclusion of any other, namely, taking by descent.

Then just look at the mode in which this word is dealt with in the preceding part of it, in what I call the first limb of the clause, "who shall succeed to the honours and estate of Lou- "doun." Here "succeed" is applied to these two things, "honours" and "estate," to one of which things it can have no application by possibility, except succession by descent, because no persons can take honours by purchase, and yet

"honours" and "estate" are coupled together in the same limb of the sentence, and consequently "*succeed* to the *estate* of Lou- "doun" must there be taken to mean precisely the same thing as when you say "succeed to the *honours* of Loudoun." Then comes the expression in the latter part of all and which follows, the part which I call the ultimate portion of the destination, "and so soon as the son of this marriage, or other aforesaid, "shall accept of the honours and estate of Loudoun." Now, "accept the estate of Loudoun" is intelligible, and might mean shall *take* the estate of Loudoun in any way, because a person who inherits an estate may renounce his succession, and a person may be said to accept an estate when he purchases an estate, or receives it in exchange, as in the case here, which was a purchase, or when he receives it by gift. But "accept the honours" cannot mean that,—"accept the honours" must therefore mean *take* the honours, and honours can only be taken by descent, the honours of Loudoun at least; there could be no new creation, they could only be taken by descent, and therefore "accept the "honours and estate of Loudoun," means "take by descent the "honours and estate of Loudoun," and you must here construe the word "accept," in consequence of the word "estate" coming after it, as well as "honours," in the same manner as regards the honours, that you do as regards the estate, just as in the preceding clause, you must construe in regard to the estate the word "succeed," when it comes to be applied to the words "honours" and "estate" together, in the same manner as you construe "succeed to the honours," because the words "honours" and "estate" are applied precisely in the same manner to, and connected with, the word "succeed."

Now these views, taken from the first and from the last part of this clause, appear very much to bear out the construction which the Court below have put, and which we are inclined and very clearly disposed to put, upon the word "succeed" in this part of the clause, "succeed to the said estate of Rowallan,

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"in case any heirs of the marriage shall succeed to the estate of "Loudoun." But I by no means consider that it is necessary, in order to put that construction upon those words, that we should have either the first part, "succeed to the honours and estate," or the last part, "accept the honours and estate," to guide us and to light us upon our way towards that conclusion; for I am perfectly free to confess, that if those words had stood alone "succession" and "succeed to the estate of Rowallan," as they do in the middle, which is the important and governing part of the clause, if they had stood alone, without any light cast upon them by the former or the latter part of the clause, "succeed to "the estate" in the former, "accept the honours and estate" in the latter, I confess that my opinion would still have been strongly in favour of the construction which has been put upon it by the Court below.

My Lords, the case of Taylor *v.* Lord Harewood appears to me a very important decision as regards our views of similar expressions and of similar subjects in an English deed. That case differs from this only in one respect, it is a great deal stronger for the construction which was there put upon it, and for the present construction now in controversy among the parties, than the case at the bar. I do not quite go along with one or two of the reasons upon which that case rested; but independently of those questionable reasons, there remain perfectly sufficient grounds for that decision, and that decision, which I think a perfectly clear and sound one, is, as I said before, considerably stronger than the case which is now before us.

One might suppose, as was ventilated in the course of the argument, cases of a sale to a stranger, or of an exchange with a stranger, and a subsequent repurchase of that estate from that stranger, where there was no privity whatever as regards the family, or any arrangement as to the family, where nothing could turn upon the qualification introduced (under the pressure, I think, of the argument and those considerations,) into Lord

Moncrieff's reasoning, from what is called "succession in the "estate of the family" (a gratuitous introduction by the way), where the introduction of any such circumstance was impossible, where the party took entirely as it were in gross, without any regard to settlement, without any regard to family, but only as a purchaser, where the estate had been sold out and out, and it had been bought by a stranger, and it was afterwards repurchased into the family, at a distant period of time, by one of the heirs of entail; if the argument be good for anything, it is impossible to repudiate its application to that case, and then you would have this result,—that a person in the family having at some future time, by a repurchase of that estate, which had got out of the family by sale or exchange, again acquired it by a totally separate and independent transaction, would then be understood to have accepted the estate, would then be understood to have "succeeded" to the estate, would then be understood to be in such a position that it was a "succession" to the estate of Loudoun, and a forfeiture of the estate of Rowallan.

[*Lord Chancellor.*—A judgment creditor, for instance.]

LORD BROUGHAM.—A judgment creditor is a case which immediately presents itself. A judgment creditor might be in that position; he accepts, he takes, he succeeds, according to the force of the argument, and therefore it is impossible to say that this very judgment creditor might not stand in the same position, yet if he happened to be of the Loudoun succession, he, though a judgment creditor upon Rowallan, would be precluded from benefiting himself by the Loudoun succession.

My Lords, I must say, with the very greatest respect for the learned Judges who have argued the case in the Court below with their usual ability, that they do not appear to me to have shown their accustomed sagacity in forming for themselves, once for all, a clear view of the case. For the best way of deciding or of dealing with any case is to begin by first of all forming to yourself a clear and distinct view of what the ques-

tion is which is before you, and which you are called upon to decide; but if you begin by getting entangled in the mazes of an argument—if you take it up piecemeal, and if you go from one thing to another, and only by degrees get to understand what the real point of the matter which is brought before you for your determination is—the consequence is, that you either never get at that clear view at all, or you get at it entangled by the mazes of the arguments through which you have been proceeding before you arrive at it. If the learned Judges had just at first applied their minds to what it was that was before them, and distinguished it from what it was that they really had not to determine, my opinion is, that they would not have bestowed so very elaborate a train of reasoning upon what does not seem to me to be incumbered with any degree of difficulty, and that we should have had less discrepancy in their judgments, and less argument probably before your Lordships. I am free to confess, with the utmost possible respect for those learned Judges, that I do not feel the pressure of the difficulties under which they seem to have laboured, and against which they seem, with various success, some more successfully and others less successfully, to have struggled. I do not think that the case is one of difficulty, I do not think the case is one of doubt. I do wonder that it is an obscure case, I do wonder that it required very much discussion—and I marvel that there should have been so great a difference of opinion in the Court below. I say this with all possible respect to those learned persons; but it is the opinion which my noble and learned friend and myself have formed from the beginning of the case, which has abided by us through the whole course of the argument, which has not been shaken by any attempts to displace it on the one hand, and which has not been materially confirmed by any attempts which have been made successfully, if it had been required, to strengthen the impression upon the other.

I am exceedingly glad, however, as there was so much dis-

cussion in the Court below, as the case was so elaborately argued there, and as it was the cause of so much difference of opinion there, that it has been so fully and elaborately argued before your Lordships, and I will add, that I feel thankful, therefore, to the learned counsel who have taken the pains so thoroughly to sift and to argue it; and I feel that it was brought before us, as I stated in the outset of my observations, after the most thorough scrutiny in the argument on either side, and after the greatest pains and attention having been bestowed to guide us to our conclusion.

LORD CHANCELLOR.—The noble and learned Lord who attended throughout the whole of the argument, (*Lord Campbell,*) and who is necessarily absent to-day, has requested me to state to your Lordships, that he entirely concurs in the view which has been expressed by my noble and learned friend and myself.

The *Lord Advocate* objected to any finding of costs, because of an agreement which he stated had been made between the parties upon the subject, and which was referred to in the judgment of the Court below. After a discussion between counsel as to the existence and extent of the alleged agreement, the

LORD CHANCELLOR said,—Lord Advocate, I apprehend an order here for costs, if there be a contract to prevent the parties from receiving them, will not give them the right. It is like a judgment at law, which has an equitable contract going with it.

LORD BROUGHAM.—I do not think the parties will be damnified by the usual order at all.

Mr. Turner.—Your Lordship's order applies to all the appeals, of course.

LORD CHANCELLOR.—Yes, certainly.

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The following order was made in all the three appeals.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

RICHARDSON, CONNELL, and LOCH—DURANT, STEWART, and MAXWELL—GRAHAM, MONCRIEFF, and WEEMS, Agents.

[*26th April*, 1847.]

JAMES CLELAND, of Ravenshall, *Appellant.*

MRS. MARY WEIR, Executrix of the late William Weir, of Shotts, in the county of Lanark, and Others, *Respondents.*

Jury Trial.—Issue.—Observations of the House upon the structure of issues, and the mode of their trial.

IN January, 1834, the Appellant, as general disponee, and sole heir and executor under the last will of Williamson, brought an action against William Weir, alleging that on the death of Williamson, which happened in Yorkshire, the place of her residence, in the month of January, 1829, Weir had searched her repositories, and found in them a will which had been executed by her on the 8th of July, 1816, whereby she appointed Weir and another her sole executors; that at the same time he found written evidence that the testatrix had executed a subsequent will on the 4th August, 1821, whereby she nominated the Appellant executor, and revoked her previous will of 1816, and that this will had been placed by her in the hands of her solicitor. That Weir induced the solicitor to believe that the will which he had discovered was subsequent in date to that in the solicitor's hands, and communicated to the Appellant the contents of the will of 1816, but concealed from him the existence of the will of 1821. That Weir alone proved the will of 1816, and took possession and management of the real and personal estate and effects of the testatrix, and sold part of her effects without taking means to secure the best prices that could be got for them. That in March, 1832, the Appellant became aware of the existence of the will of August, 1821, and adopted proceedings in the Ecclesiastical Courts in England, in which, in July, 1833, he obtained a sentence recalling the probate of

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the will of 8th July, 1816, and setting up that of 4th August, 1821, and granting probate thereof to the Appellant as executor. Upon this statement the summons concluded that Weir should be ordained to deliver over to the Appellant the whole means and estate of the testatrix, or failing his doing so, to make payment to him of 1500*l.*, as the value thereof; that he should also be ordained to hold count and reckoning of his actings as executor, and produce all proper vouchers, and to make payment of the balance which might be found to be owing upon the accounts; and that Weir was bound to have used strict legal diligence for recovery of the testatrix's estate, and was liable to make good any loss which might have arisen through his default in that respect.

Weir pleaded in defence to this action, that he proved the will of July, 1816, in ignorance of the will of August, 1821, and what he had done as executor had been with the authority of the Appellant. That in 1831 his suspicions of a will having been executed by the testatrix in 1821 were raised by the discovery of some letters, and in the autumn of 1831 he became aware of the existence of the heads of a will, and of a draft of the will itself, and until the sentence of the Ecclesiastical Court was obtained by the Appellant, establishing these papers as a will, it was very doubtful whether they could have that effect. That on being satisfied in this respect, he brought an action of multiplepoinding against all the parties interested, in which he set forth his receipts and payments, and his readiness to pay the balance in his hands to the parties interested, and in these circumstances the conclusions of the Appellant's action for count and reckoning were unnecessary, and those for damages were without foundation.

After the death of Weir the action was continued against the Respondents, and the following issue was sent for trial by a jury:—"It being admitted that, on the 8th day of July, "1816, the late Mrs. Williamson, Scarborough, then spouse of

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" Richard Williamson, of Scarborough, executed a testamentary " deed, by which she appointed the original defender, William " Weir, and another, her executors, and that on the 4th of " August, 1821, she executed a last will and testament, by " which the pursuer James Cleland was declared to be her sole " executor as to her real and personal property, Whether the " original defender, William Weir, knowing or believing the " existence of the will and testament last mentioned, by himself " or another, or others, wrongfully took, or from January, " 1829, to 24th May, 1834, or during any part of the said period, " wrongfully retained possession of all or any part of the pro- " perty or effects of the said Mrs. Williamson, or wrongfully " excluded the pursuer from the possession of the same."

This issue was tried before the Lord Justice Clerk, who in his charge to the jury, laid down that " it was not sufficient for " the pursuer merely to prove that the defender William Weir " knew or believed the existence of a later will or testament to " that of 8th July, 1816, of some date or other, without know- " ing or believing it to be of the date of the 4th of August, " 1821, mentioned in the admission: and also, that, according " to the true construction of the issue, it was necessary for the " pursuer to prove that the late William Weir knew or believed " in the existence of the will mentioned in the admission— " namely, a will of the date mentioned, by which the pursuer " James Cleland was declared to be her sole executor as to her " real and personal property. But if they were satisfied that " the defender William Weir knew or believed the existence of " a will and testament of the date mentioned, although he " might not know in whose favour it was, he wished them " separately to find to that effect."

The counsel for the Appellant excepted to this charge at the time, but the exception was overruled, and the jury found a verdict, " that William Weir knew and believed the existence " of a will and testament made after the one dated 8th July,

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" 1816; but do not find it proven that he knew in whose favour " the said will was, or the date of the same: And, farther, find " that William Weir did not wrongfully retain possession of all " or any part of the property or effects of the said Mrs. Wil- " liamson, *until after* the pursuer proved his right as executor: " But find that the said William Weir wrongfully excluded the " pursuer from the possession of the said property or effects " after the second will was proved."

A bill of exceptions to the charge was argued along with a motion for a rule to show cause why a new trial should not be granted. After argument the bill was disallowed, and the rule refused by the Court on the 27th November, 1846.

The appeal was against this interlocutor.

The *Hon. Mr. Wortley* and *Mr. Anderson* were heard for the Appellant, and

Sir. F. Kelly and *Mr. Rolt* for the Respondent.

LORD CHANCELLOR.—My Lords, this case comes before your Lordships on an appeal against an interlocutor of the Court of Session disallowing a bill of exceptions taken at the trial, and the question is, whether the mode in which the learned Judge put the case to the jury was such as to make it the duty of this House to direct that the matter should be tried again.

Now the contest between the parties need not be adverted to further than appears on the interlocutor of the Court which is appealed from. The interlocutor directing the issue is in these words:—" It being admitted, that on the 8th day of July, " 1816, the late Mrs. Williamson, Scarborough, then spouse of " Richard Williamson, of Scarborough, executed a testamentary " deed, by which she appointed the original defender, William " Weir, and another, her executors, and that on 4th August, " 1821, she executed a last will and testament, by which the

" pursuer James Cleland was declared to be her sole executor " as to her real and personal property." With that admission, it became a question for the jury to try, whether the original defender, Weir, retained possession of all or any part of the property of Mrs. Williamson, or wrongfully excluded the pursuer from the possession of the same.

Now, my Lords, I entirely coincide in the opinion expressed by my noble and learned friend in the course of the argument, as to the complexity of this issue, involving different propositions which are each of them separate and minute. Here, however, it is—we are not now to try the merits of this issue, but to put a construction on what was meant to be tried, in order to see whether the intention of the issue was carried out by the mode in which the trial was conducted.

We have the fact of there being two testamentary papers, one of 1816, the other of 1821, and we know also that William Weir was the executor named in the first, and that the pursuer was the party named in the second; and the object of the enquiry is, whether William Weir, knowing or believing the existence of the testament last mentioned, (which is the one of 1821,) fraudulently took possession of and retained the property coming from the testatrix.

Now this matter came to be tried, and I must observe, my Lords, that it is clear that the date which this issue uses is merely designative of the will. There are two wills, and the latter one is the will last mentioned, and that is 1821; the real object of enquiry is, whether when this party was using and pleading the testamentary paper of 1816, he had knowledge of the paper of 1821, and if he had, whether, with such knowledge as he did possess, he wrongfully appropriated to himself the possession of the property of the testatrix. The Judge told the jury " that it was not sufficient for the pursuer clearly to prove that " the defender, Weir, knew or believed the existence of a later " will or testament than that of the 8th of July, 1814, of some

"date or other, without knowing or believing it to be of the "date of the 4th of August, 1821, the date in the admission."

Now as to that part of the direction of the learned Judge, I should not at all think there was any objection to it, if he had confined himself to this, that it was not open to the parties to prove that Weir knew the existence of any will or testament later than that of 1816, of some date or other, because that is not the object of the issue. The object of the issue, my Lords, is to direct the jury to enquire whether he knew of the will of 1821; but then the object is not to enquire whether he knew the date of the will of 1821, but whether he knew of the existence of that will which is found now to bear date in 1821.

He then goes on:—"And also that according to the true "construction of the issue, it was necessary for the pursuer to "prove that the late William Weir knew or believed in the "existence of the will mentioned in the admission, viz., a will "of the date mentioned, by which the pursuer James Cleland "was declared to be her sole executor as to her real and per-"sonal property."

Now, my Lords, considering what the object of the issue is, namely, to ascertain what knowledge Weir had of the will of 1821 when he proved the will of 1816, or during the intermediate period, how can it be material, whether his knowledge extended to the date of that will, the question being whether he wanted to retain property which did not belong to him, as representing the will of 1816—property affected by a will of a subsequent date.

I do not refer to the finding of the jury, which has been adverted to in the argument, for the purpose of seeing how far this direction is likely to have misled the jury. I see on this finding what may or may not amount to evidence of its having done so in point of fact, but which is not extremely doubtful, and for this reason; they are to enquire first as to the defender's knowledge of the will of 1821; then they are to enquire

whether he fraudulently withheld the possession of the property. It is quite obvious, my Lords, that that latter enquiry must depend very much on the result of the first. There may have been a limited knowledge of the will of 1821. There may have been some reason to suspect the existence of that will, and he may, at the time, have believed that it was destroyed. We cannot tell. It is matter for enquiry; but they can come to the conclusion solely from the degree of information they obtain as to the knowledge that Weir had of the will of 1821, and the substance and contents of the will. Then the jury are told it is quite immaterial if you find that he had a knowledge of the will of 1821, unless you also find that he had knowledge of the date of the will of 1821. The other part is much more material, and the date is perfectly immaterial. But the jury are told:— "Do not pay attention to anything of knowledge he may "have had unless it is accompanied with the date." He may have had quite sufficient knowledge of the contents of the will of 1821 to have made him quite certain that he was acting in fraud of somebody at least by pleading the will of 1816, and not dealing with the existence of a subsequent testamentary paper, but he may not have known the date, or he may have been mistaken in the date. The jury say, "we find he had "knowledge of the will of 1821, but it is not proved to us he "had knowledge of the date." Then the Judge tells them not to pay any regard to the knowledge, unless it is accompanied with knowledge of the date. They naturally pay attention to the direction of the learned Judge, and that knowledge of the date which they are told is essential, and without which they were not to pay any attention to it, is to negative the fraud.

It is not necessary to show that this direction misled the jury, it is sufficient to show that it is calculated to mislead; that they might have been misled. The direction was not such as properly grew out of the issue which they were trying; and for these reasons I submit to your Lordships, that the inter-

locutor of the learned Judge was wrong, and that the interlocutor appealed from ought not to be supported.

LORD BROUGHAM.—My Lords, I have considered this case throughout the argument as free from all reasonable doubt. I am sorry to say that I am so bold, because, my Lords, I have the most sincere and unfeigned respect for the learned Judges, all of whom appear to have fallen into error, and all precisely into the same mistake, one following the other. Lord Medwyn says in the most express terms (having first stated the issue) that the date is material, and that the knowledge of the date is a material fact in the case, and that it signified not what the jury found, provided they did not find the knowledge and belief of that particular fact. Lord Moncrieff goes on the same ground, and Lord Cockburn says still more explicitly the same thing. The Lord Justice Clerk's words cannot for a moment be doubted. I for a moment fell into the mistake of supposing that the thing had been an oversight, and that in the course of summing up, the Judge, as often happens, had made a slip in addressing the jury. But it turns out that the matter was argued before him, and he persisted in the erroneous opinion he had formed; and it was not only argued, but he went out to consult two of the Judges. Consequently, my Lords, he deliberately considered the case, and it was no slip or misunderstanding whatever. He first tells the jury it was not sufficient to prove the knowledge of a will later than 1816, of some date or other. If he had stopped there that would have signified nothing. But he goes on, "without knowing or believing it "to be of the date of 4th August, 1821," and then he goes on and says, "it was necessary for the pursuer to prove that the "late William Weir knew or believed in the existence of the "will mentioned in the admission," viz., a will of the date mentioned—"that is of the 4th of August, 1821."

Although, my Lords, we are not here to consider the issue,

we are to consider the manner in which the learned Judges have dealt with the question raised by the bill of exceptions, and that question is, whether or not the Judge misled the jury. But I am quite disposed to believe that the jury were misled by the very clumsy, complicated, and inartificial manner in which the issue is framed. It says, "whether the original "defender, Weir, knowing or believing the existence of the "will and testament last mentioned by himself," and so on, "wrongfully took, or from January, 1827, to 24th May, 1834, "or during any part of the said period, wrongfully took posses- "sion of the goods." I think that paragraph, "knowing or "believing the existence of the will and testament last men- "tioned," referring thereby to the will of 4th August, 1821, may have misled the learned Judges as to what was the issue before the jury, and to which alone the Judge's direction ought to have been applied. It is therefore the more vexatious that this issue should have been so framed, and which I trust will be avoided in future. One affirmative on the one side, and one negative on the other meeting that affirmative, is the definition of an issue, and if there are more facts than one sent to a jury, there ought to be for each of those facts one negative on the one side, and one affirmative on the other, which forms the issue upon that fact, and it is a most clumsy, inartificial, and dangerous mode of proceeding, to jumble together different matters in the same question. Every one knows you cannot get a distinct answer when you do so.

Suppose, my Lords, I put a question to a witness—and a question put to a jury is just the same—suppose I put this question to a witness:—"Did you go to York and buy a horse "there?" The man may not know how to answer; he may say, "I bought a horse, but I did not go to York," or "I went "to York, and I did not buy a horse," or "I neither went to "York, nor bought a horse," or "I both went to York and "bought a horse." Four distinct answers might be given to

this question, whether Weir, knowing the existence of the will, wrongfully took possession. He might have known of the will and not have taken possession; he might have taken possession and not have known of the will; he might neither have taken possession nor known of the will; or he might have both taken possession and known of the will. Just the same as in the case of the man going to York and buying a horse. It is not the way to put a question to a witness or to a jury, and I do think it tends much to confound the case and lead to the error which has been committed here.

This, my Lords, being clear, I agree with my noble and learned friend entirely, in thinking that it is not necessary to show that in point of fact the misdirection of the learned Judge led to the finding of the jury. It is quite sufficient for us that it might naturally lead to it, that it might without any constraint have led to it. It is enough that when I look at that direction, and when I look at the finding, a suspicion arises on my mind of its being highly probable that they did find as they found in consequence of that misdirection. It is quite sufficient that they might, without any constraint on the meaning of it, have been expected naturally to lead to that conclusion.

On the whole, therefore, my Lords, I am clearly of opinion that this interlocutor cannot stand, that there must be a *venire do novo*, and that, reversing the order of the Court below, disallowing the bill of exceptions, we must reverse that part of the order which awards expenses, and also the second interlocutor upon the account, giving 44*l.* 15*s.* 10½*d.* as the expenses.

[*Lord Chancellor.*—It is not appealed from.]

LORD BROUGHAM.—Then the first interlocutor must be reversed. We allow the exception and refuse the expenses applied for; that will be the judgment of the House.

LORD CAMPBELL.—My Lords, I feel under the necessity of concurring with my noble and learned friends, and it grieves

me very much indeed to find such a direction as this laid before a jury in Scotland. I am afraid that that mode of trial does not prosper there as well as its well-wishers could hope, and I am afraid it is not latterly improving, for the issues are not framed, generally speaking, as well as one could wish, and the results are found really mortifying to those who were friendly to that supposed improvement in the jurisprudence of the country.

The issues here are subject to the objections which have been referred to, and it seems to me that they really mix up law and fact together. It is not an issue of fact to be submitted to a jury as to a wrongful intromission or a vicious intromission; it opens a wide field in the law. Yet the whole of this, my Lords, is submitted to a jury, whether the possession was wrongful, and what amounted to a vicious intromission, although that is not at all a fact depending on evidence to be found either negatively or affirmatively.

My Lords, I need not say there is no Judge in Scotland or England whose decision I should be disposed to have a greater respect for than that of the Lord Justice Clerk, and I am sure there is no one in Scotland who is more anxiously desirous of discharging the important duties of his high office; but, at the same time, I am a little surprised to find that he should have laid down this proposition, when his attention was deliberately drawn to the direction he had given and to the language which is here imputed to him, and which must have been used by him because he signed the bill of exceptions. I can easily suppose that he or any other Judge might use such language, and it may be possible to pick out some inaccurate expressions used in the course of a long summing up of any Judge. But, my Lords, we must now suppose that those expressions were drawn to his attention, that the question upon them was argued, that the propriety of them was called to his attention, that he took the opinion of the other Judges on it, and that he deliberately lays

CLELAND *v.* WEIR.—26th April, 1847.

down that it would not be enough for the pursuer merely to prove that the defender Weir knew or believed of the existence of a later will or testament than that of the 8th July, 1816, of some date or other. And so far, my Lords, I think the direction is perfectly right, because there are only two wills mentioned in the pleadings, and it would not be competent to introduce the knowledge of another will. I think that would have been a surprise on Weir at the trial to attempt to prove that he knew some other will. Therefore, my Lords, so far I think the direction of the learned Judge is unexceptionable, but then, when we come to the part "without knowing or believing "it to be of the date of the 4th of August, 1821," I am bound to say, that is an erroneous direction, it is making the date parcel of the issue, and saying that, although Weir knew the contents of the will in every respect, and knew that it revoked the will he had proved, and conveyed all the property of the testatrix to another person, still that without his knowing the date it would entitle him to have the issue found in his favour.

Now I was at first of opinion that we should be able to put a different construction on this, and to make the words "without knowing or believing it to be of the date of the 4th of "August, 1821," merely descriptive of the will, to make it identify the will, and if you could only blend in the words which have been suggested, "believing it to be the will of 4th "August, 1821," or, as Sir Fitzroy Kelly put it, to be *that* of the 4th August, 1821, it would have been merely a reference to identify the will, and would not have made the date an essential part of the issue. But the learned Judges prevent us from putting such a construction on it, because Lord Medwyn, Lord Moncrieff, and Lord Cockburn, more pointedly than any of them, consider the date as an essential part of the issue, and that without knowing the date the party would not be entitled to the affirmation of the issue. Lord Cockburn says:—"So "that in my view the issue is, whether the defender, knowing

" the existence of a will by the deceased, dated the 4th August, " 1821, and in favour of the pursuer as sole executor, did " wrongfully retain possession." It is not knowing the existence of the will of 1821—it is knowing the date of the will, and therefore it seems to me " the date of the will" is mistaken for " the will of the date," instead of being " the will of the date," they say it is " the date of the will." It is perfectly easy to conceive that Weir knew of a will of that date, though he did not know the date of the will.

I think under these circumstances, my Lords, we have but one course to pursue, which is, to come to the conclusion that this direction had a tendency to mislead the jury, and although it did not appear to us that the jury had been misled, we should be bound by our opinion, in the exercise of the functions which devolve on us, to say that the exception ought to have been allowed. But, my Lords, when I look at the verdict, I must say it seems to me there is great reason to suppose that the jury have been misled, because the jury found that Weir knew of the existence of a will and testament made after July, 1816. There was no other will in controversy except this one of August, 1821. Therefore, if he knew of a will after July, 1816, he must have known of that will—but the jury " do not find it " proven that he knew in whose favour the said will was, or the " date of the same." That is, he knew of the will of 1821, but he did not know the date of that will, or in whose favour it was. He did know of the will of 1821, though he did not know the date of that will.

Under these circumstances, my Lords, we are not at liberty, and it would not be competent for us, to do more than merely to set aside the interlocutor, disallowing the bill of exceptions. I should be very loth to come to a conclusion on that finding, that there had been wrongous or vicious intromission. But Weir had knowledge of the will, though he did not know the date, or in whose favour it was; he knew it was of a subsequent

date, and must have been aware that it revoked the will under which he claimed.

Under these circumstances, my Lords, I agree in the opinion expressed by my noble and learned friends, that the interlocutor which disallows this bill of exceptions must be reversed.

Mr. Wortley.—After what has fallen from your Lordships with regard to the issue, perhaps it would not be disrespectful if I were to submit to your Lordships that you might order the issue to be reformed. There may be a doubt whether the Court of Session has power to do it.

LORD BROUGHAM.—We have nothing to do with it. It is not before us.

LORD CHANCELLOR.—The appeal is not against the issue.

Mr. Wortley.—It would be for the benefit of both parties, my Lords.

Mr. Rolt.—It could not be done without our being heard on it.

LORD CAMPBELL.—The issue is not skilfully framed, but still under it the case may be tried.

Mr. Wortley.—A new issue, my Lords, might be sent instead of the same one.

LORD BROUGHAM.—We have nothing to do with it.

Ordered and adjudged, That the interlocutor complained of in the appeal be reversed: And it is further ordered and adjudged, That the bill of exceptions referred to in the said interlocutor of the 27th of November, 1846, be allowed, and that a new trial be granted: And it is also further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

DUN and DOBIE—DEANS, DUNLOP, and HOPE, Agents.

[20*th May*, 1847.]

H. M. and A. M., *Appellants.*

ARCHIBALD SCOTT, Procurator-Fiscal of the Shire of Edinburgh, *Respondent.*

Jurisdiction.—The Court of Session has no jurisdiction to review proceedings taken by the Procurator-Fiscal before the Sheriff for the security of the public against a party alleged to be insane.

ON the 7th of March, 1835, the Respondent presented a petition to the Sheriff of Edinburgh, stating that he had received information that the Appellant A. M. was in a state of mental derangement, and had not only written improper letters to different persons, but had also attacked, insulted, and annoyed them in the streets of Edinburgh, whereby he had put them in fear and alarm, and praying that a warrant might be granted for his apprehension and examination, and that in case these statements should be proved, a warrant might be granted for his imprisonment until further order, or until sufficient caution should be found that he would be kept under such confinement or restraint as would prevent him doing injury to or conducting himself so as to injure, annoy, or alarm any person.

The Sheriff granted warrant of apprehension according to the prayer of the petition, but before it had been served upon the party, the other Appellant, H. M., appeared and signed an undertaking, which was endorsed upon the petition, whereby he "judicially bound and obliged himself, under a penalty of "one hundred pounds sterling, that the said A. M. will be put "under restraint and kept in proper custody, and not allowed "to go at large until it is certified by a proper medical person "that he is in such a state that he may be allowed to go at "large with safety to himself and others."

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In the month of November, 1844, the Appellants brought an action in the Court of Session concluding for reduction of the above undertaking.

The Respondent pleaded, as a preliminary defence, that the action was incompetent and inadmissible, and that the parties must seek their remedy in another form and place.

The Lord Ordinary sustained the defence and assoilzied from the conclusions of the action. But this interlocutor being applicable to the merits which had not been tried, the Court altered it in so far as it assoilzied, and of new sustained the defence and dismissed the action.

The appeal was against both interlocutors.

The *Hon. Mr. Wortley* and *Mr. Anderson* were heard for the Appellants, and

The *Solicitor-General* and *Mr. J. Moncrieff* for the Respondents.

Lord Chancellor.—My Lords, it appears to me that this judgment must be affirmed.

The public officer, the Procurator-Fiscal, whose duty it was to see to the safety of the public, and to bring before the proper Court any person whose conduct might lead to a breach of the public safety, being satisfied of the truth of the statements made to him, and having reason to suppose that the party might do an injury, makes an arrangement with a relation of the party accused, who undertakes in the terms stated in the papers.

Now it was competent for this public officer to interpose, and either to take on himself to bring the party accused before the Sheriff, or to enter into any arrangement for the security of the public. I do not find any authority before your Lordships which at all shows this transaction which has taken place

between the Procurator-Fiscal and the relations of the party accused to be a transaction which might not properly be made the subject of investigation before those who had the revision of the criminal jurisdiction.

As to the jurisdiction, the question is, whether the Court of Session had jurisdiction to examine into the transaction? It appears to me where the nature of the examination was into the act of the criminal prosecutor, the Procurator-Fiscal, and where the Court of Justiciary have the power of revision, this action cannot be sustained. It is not disputed that the exercise of that right, whether rightly or wrongly carried into effect, which the Procurator-Fiscal held, might be made the subject of investigation in the Justiciary Court. The question is, whether the Court of Session has the jurisdiction which is here sought to be conferred on it? If they have, then they might, in the exercise of their civil jurisdiction, take upon themselves to determine whether the transaction had taken place rightly or wrongly in a Criminal Court. Can that be so? The jurisdictions are separate. The only question here is, whether they had that jurisdiction. I think not—and, therefore, that the judgment below should be affirmed.

Lord Campbell.—My Lords, I was at first startled with the argument that the Court of Session could be ousted of its jurisdiction. I could not understand the difference between a contract with the Procurator-Fiscal, and an obligation or contract by which a civil debt is created—that which is called in these proceedings a "bond," but which is called in England a "recognizance," as the noble and learned Lord has just stated. There is, however, this difference in principle. Here, proceedings are entered into by which the party says, I owe to our Lady the Queen the sum of 100*l.*, on condition that A. M. be kept under restraint upon the petition of the Procurator-Fiscal, and that he be kept in proper custody, and be not

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allowed to go at large until it shall have been certified by a proper medical person that he is in such a state as that he may be allowed to go at large with safety to himself and to others. Now that is what I call a recognizance—the conditions are named in it—and whether those conditions be broken or not is to be determined by the Court in which the recognizance is entered into.

It is admitted by Mr. Wortley that if this is a criminal proceeding, and recognizance be taken by the procedure in Scotland, the remedy would be before the Sheriff, and in the Court of Justiciary, and that the Court of Session has no jurisdiction. It would appear to me to be a most anomalous state of things, that one Court should have jurisdiction over another in the manner contended for in the argument. It is clear that the exercise of those powers which are conferred on the Procurator-Fiscal may be examined into before the Sheriff, or it may be examined into by the Superior Court, the Court of Justiciary. Therefore it may be considered that, as far as the Court of Justiciary is concerned, there is a power to inquire into the validity of proceedings in criminal suits. And consequently, it would be very inconvenient, and clearly contrary to all the course of proceedings in that part of the country, if the Court of Session were to interfere.

I quite agree with the Judges, who were unanimous on the subject, that the proper remedy, if there were any remedy, would be before the Sheriff, and afterwards before the Court of Justiciary.

I cannot suppose that there has been any irregularity throughout the whole of this case—not the slightest irregularity. I find my Lord Ordinary, who is very well acquainted with the mode of proceedings in Scotland in these cases, says, it does not appear that there has been anything done in this case different from what is done in similar cases. And a very wholesome proceeding it is, that when a person is in this precarious state,

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God Almighty only knowing whether he will ever be liable to criminal procedure, or whether he is only under the visitation of Heaven—that when he has done that which is the subject of punishment, and when process has been taken out, and judgment pronounced against him—it is a most wholesome proceeding that recognizance should be entered into for him by some friend to keep him under restraint, and that he should not be allowed to go at liberty until he has recovered his reason. A most salutary proceeding it is, and one most perfectly in accordance with the law; and the requiring that that recognizance should be given, was a proceeding wholly unexceptionable.

There is no doubt, my Lords, in my mind, that the proper tribunal in which this ought to have been brought was the Court of Justiciary, and not the Court of Session. I therefore am of opinion that this judgment should be affirmed.

In these opinions Lord Brougham concurred.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed with costs.

Law, Anton, and Turnbull—Richardson, Connell, and Loch, Agents.

[HEARD 20*th*, JUDGMENT 31*st May*, 1847.]

ANN WOOD or WILLOX, wife of SIMON WILLOX, Farmer, at Blackmyre, St. Fergus, and Others, *Appellants.*

BELL or ISABELLA YOUNG or FARRELL, relict of the late JOHN FARRELL, residing in Stonehaven, *Respondent.*

Witness.—Competency of.—Evidence.—Objection to Witness.—In order to support an objection to the *competency* of a witness on the ground of interest, it is not enough to show that the result of other proceedings at the instance of the witness, will depend upon the same facts as he is called to establish, so that he has an interest *in the question* at issue, it must be shown that the witness has an interest *in the event* of the action in which he is called, by being able to use the verdict or judgment either as *res judicata*, or as evidence in his own proceedings, or by deriving from it some other as direct and immediate advantage.

ALEXANDER WOOD died, leaving considerable estate, both real and personal. The Respondent alleging herself to be the cousin once removed of the deceased, as being the grand-daughter of an *aunt* called *Margaret* Wood, procured herself to be served his nearest and lawful heir.

The Appellants alleging themselves to be the cousins once removed of the deceased, as being the grand-children of an *uncle*, brought an action for reduction of the Respondent's service. In this action an issue was sent for trial, "Whether "Mrs. Ann Wood or Willox and Mrs. Elizabeth Wood or "Pope, are the nearest and lawful heirs-portioners of Alexander "Wood, of Woodburnden, deceased."

At the trial of this issue, the Respondent contended that the common ancestor of the deceased was James Wood, who had a son James and a daughter Margaret, that the deceased

was the son of James, and that she was the grandchild of Margaret.

On the other hand, the Appellants contended that the common ancestor of the deceased was George Wood, who had two sons, George and James, and no daughter named Margaret, that the deceased was the son of James, and that they were the grandchildren of George.

The Appellants, in order to prove their pedigree, proposed to examine Elizabeth Wood, a younger sister of their father, and cousin-german of the deceased. This witness, in an examination *in initialibus*, answered that she was the aunt of the Appellants, and that the deceased left both lands and money.

The Respondent objected to the admissibility of the witness, on the ground that if the Appellants succeeded in proving themselves to be the heirs of the deceased, Elizabeth Wood would be one of his next of kin, "and had an interest in the "succession." The Appellants did not deny that in that view, the proposed witness would be one of the next of kin; but they denied that she had an interest in the issue in the cause. The Judge presiding sustained the objection, and refused to allow the witness to be examined, whereupon the Appellants excepted to this rejection of evidence; and thereafter the jury delivered their verdict for the Respondent.

A bill of exceptions was argued before the Court and disallowed on the 2nd March, 1847.

The appeal was against this interlocutor.

The Hon. Mr. Wortley for the Appellants.—So far as the examination of the witness objected to went, or as any other evidence exists, it only appears that the deceased died leaving lands and money. It nowhere appears, whether he died testate or intestate; whether his debts were paid, or whether, if they were paid, there would be any free executry for his next of kin to take, supposing him to have died intestate. Even assuming,

therefore, the effect of the witness's evidence might in some way aid her in establishing that she is one of the next of kin, *non constat* that she had any interest to establish that character.

But admitting that the witness had such an interest, there was no question as to the *personal* estate, which alone she could take as next of kin. The question regarded the *real* estate of the deceased, the succession to which is altogether distinct from the succession to the personal. A verdict for the Appellants gained through the evidence of the witness, and establishing their characters as heirs-portioners, would not establish the right of the witness to the moveables, and as little will the verdict in favour of the Respondent disaffirm such right. Her right will remain precisely as it did before this question originated, and if the service of the Respondent should stand unreduced, it will not operate any bar to the establishment of the witness's right, if it exist, to obtain confirmation as executrix of the deceased.

Although, therefore, it be true that the witness, in the terms of the objection taken to her examination, is interested "in "the succession," she is no way interested in the event of the Appellants' action, or in their success in the trial of the issue. The conclusions of the action have no reference to any estate or interest upon which she has a claim of any kind whatsoever. It is not pretended that the witness had any right to the character of heir; she could neither, therefore, have prosecuted a brieve of service herself, nor appear to oppose that of the Respondent's, nor can she now seek to reduce it after it has been obtained.

It may very well be that she has an interest, in the popular sense of that expression, in seeing her relative succeed, not only because of their relationship, but because her own right to the character of next of kin may depend upon the same circumstances as will establish their right to the character of next

heir. But that is not such an interest as will justify the exclusion of her testimony. It is a circumstance for the jury to weigh in judging of the credit due to her testimony as giving a bias one way, but it is no objection to her *competency* as a witness. In order to exclude her, her interest must be direct and immediate; there must either be a benefit to be derived to her immediately from the verdict, or an injury to be avoided. It is not enough that she stands in the same situation as the party calling her, and that having a similar case to be tried, the result of the verdict in the action in which she is examined may influence the jury in her own case.

The law in England upon this subject has been settled ever since the case of Walton *v.* Shelley, 1 *Ter. Rep.* 296, followed soon after by the case of Bent *v.* Baker, 3 *Ter. Rep.* 27, where one underwriter was allowed to be called as a witness for another in regard to his liability under a policy upon which they were both liable, and in regard to which an action was at the time depending at the instance of the plaintiffs against the witness. Lord Kenyon said, that "although the witness stands in the same "situation with the party for whom he is called to give evidence, "there is no doubt but it may influence his testimony, but this "does not render him incompetent, that only goes to his credit, "not his competency, if the proceedings in the cause cannot "be used for him." Bent *v.* Baker was followed by Wood *v.* Teage, 5 *Barn. & Cres.* 336. There it was ruled that an executor who took a pecuniary interest under a will, was a competent witness for the defendant in an ejectment against a devisee, the question turning upon the sanity of the testator at the time of making the will. The Court observed that the verdict would only have the effect of establishing the will as to the real property, but it would not be any evidence in the Ecclesiastical Court as to the personality—there the suit would be treated as *res inter alios acta.* So in Nightingale *v.* Maisey, 1 *Bar. & Ad.* 439, a widow was held to be a competent witness for

her son, to establish that he was heir-at-law of her husband, although the effect of her evidence was to show a seisin in law in her husband, which in other proceedings at her own instance would give her a right to dower out of the lands in question, and the ground of her admission was, because she could neither use her own evidence nor the verdict in these other proceedings; and more recently, in Wildgoose *v.* Pearce, 5 *Mees. & Wels.* 506, one party claiming an interest under a will, was held a competent witness for the plaintiff, in an ejectment, whose action was founded upon the will, and where the question at issue was the competency of the testator to make the will.

The rule of law thus well established in England, that the wishes of a witness, however influenced, where he cannot derive any direct benefit from the proceedings in which his testimony is required, will go only to his *credibility*, not to his *competency*, is no way different from the law as established in Scotland, both by text-writers and by decisions of the Courts. The cases in England give only a fuller illustration of a principle recognised both in England and Scotland. *Stair*, IV. 43, 7, says, "interest *in the cause* makes witnesses inhabile *as to that cause* "if they gain or lose thereby; but that *fovent consimilem* "*causam* is not a good objection, for that conjunction of interests "relates to the relevancy, and not to the verity of the cause;" and *Bell* in his principles says, "the interest, in order to dis- "qualify, must be present, certain, and immediate." "It is not "a disqualifying interest that the witness has a wish for the "success of the party who calls him, or some eventual prospect "or hope of advantage in the issue," "these, though they may "influence his testimony, go to his credibility only, neither is "it enough that the witness has a *similar* case to maintain, if "the verdict or judgment cannot be used in his favour."

These *dicta* are supported by the decisions of the Courts; thus, in Marshall *v.* Anderson, *Mor.* 16787, two witnesses

alleged to have committed adultery with a married woman, who called them in an action for divorce grounded upon the adultery, were by a judgment of this House, reversing that of the Court of Session, admitted as competent, in disregard of the objection sustained by that Court that the witnesses had an interest to give evidence for the defender, because they could not give it for the pursuer without disclosing what would ruin the defender, in whom they must be supposed to have an interest, and might subject themselves in damages to the pursuer. So in Innes *v.* Glass and Co., 4 *Murr.* 163, where the question was, whether damage to a ship had been caused by the fault of the master and seamen, these persons were admitted as competent witnesses, although it was objected that their evidence given one way might expose them to a claim for relief. *Adam, Ld. Ch. Com.* said, "unless the verdict is evidence for or against the witness in the "question of his liability, the objection is not good, the facts "alleged go only to the credit of the witness." And in Campbell *v.* Davidson, 4 *Murr.* 176, a legatee was admitted to prove a deed, although the effect of his evidence went to increase the fund from which his legacy was payable. These authorities are supported by a judgment of this House in Ralston *v.* Rowat, 1 *Cler. & Fin.* 424, 6 *Wil. & Sh.* 480; there, in an action to reduce a settlement upon the head of deathbed, the medical attendant of the testator was admitted as a witness for the pursuers, although he swore that he considered himself to be a nearer heir of the testator than the pursuers, and upon this ground, that the verdict could not be used for or against the witness in any proceedings which he might afterwards adopt to establish the character which he asserted he had a right to.

In the present case, the verdict, if given for the pursuers, not only will not establish or assist any claim to the personal estate of the deceased, in which alone the witness is pretended to have an interest, but it will not even establish the claim of the pursuers to the realty. The only effect it will have will be

to remove the objection to sue, and to let in the objection to the Respondent's service. But even if the effect of the verdict would go much further—even if it would establish in the pursuers the character of heirs, that would not advance the claim of the witness to the personalty one step. It might raise a presumption in favour of the claim, but that is not such an interest as, according to the rules of law received in either country, would exclude the testimony of the witness, whatever effect it may have upon her credibility.

Mr. H. Robertson and *Mr. Anderson* for the Respondent.—It is not denied that the pedigrees of the Appellants and of the witness are identified, and that if the Appellants are established to be heirs-at-law, the witness must be one of the next of kin, to the exclusion of the Respondent in either character, and the witness has herself sworn that the deceased left both real and personal estate. The witness, therefore, had a strong and evident interest in the issue of the cause, as although it related only to the real estate, the succession to this depended upon the same facts as the succession to the personal estate, and the result of the discussion as to the one, must necessarily have a material effect upon the discussion as to the other.

If the verdict should be for the Respondent, she will be assoilzied from the reduction, and her retour as heir will be confirmed. In any contest with the witness for the personal estate, the Respondent would be entitled to use the verdict as showing that she had established the character of heir upon the pedigree which she asserts, and little, if any, additional evidence would be necessary to establish her right to the character of next of kin. Her service would have the benefit of having been impeached and yet confirmed.

If, on the other hand, the verdict should be for the Appellants, the Respondent's service will be reduced. The witness, in claiming the personal estate, will have nothing to apprehend

on that score, and will be entitled to use the verdict as showing that the Appellants have established the character of heir upon the pedigree which the witness asserts.

Now it is certain that retours of service are competent evidence in questions of pedigree, *Stair*, III. 5, 35, *Ersk.* III. 8, 36. This is more particularly the case with reference to *special* services which have been expede in the face of opposition—these constitute not only competent but very important evidence—and generally where the issue is upon matter of fact, as it is in the present case, it is competent to produce in evidence judicial proceedings to which both of the parties were strangers. *Stair*, IV. 43, 7, says, "Interest in the cause makes witnesses "inhabile as to that cause, if they can gain or lose thereby. "But that *fovent consimilem causam* is not a good objection, "for that conjunction of interests relates to the *relevancy*, not "to the *verity*, of the cause." So in a case from *Durie*, to be found in *Mor.* 9709, a widow having, in a question with one party, been found to have intromitted with her husband's estate, that matter was held not to require proof in a question with another party. In Kaidislie *v.* Lauder, *Mor.* 14027, a decree establishing in one case that a party was heir of his father, was held to prove the same fact in another, so long as the decree was unreduced, although the party offered to prove that the decree passed in absence, and pleaded that *res inter alios judicata aliis non nocet, et deducta in uno processu non probant in alio.* In Machargs *v.* Campbell, *Mor.* 12451, the sentence of a court-martial was allowed to be used in an action of assythment by the friends of the deceased in order to prove his death, and in Maxwell *v.* Bonar, *Mor.* 6288, the retour to a brieve of idiotry and furiosity was allowed to be received as evidence in a case with persons who had not been parties to the enquiry under the brieve; the retour, until reduced, being received as evidence.

In Angus *v.* Mags. of Edinburgh, 4 *Murr.* 343, one party

using a public market was not allowed to be examined as witness for another in a question as to the customs of the market, because he might have used the verdict in any case that might have been raised against himself by the proprietors of the market. These cases are referred to by *Tait on Evidence*, as showing that the "true criterion for judging whether the "witness has an interest in the issue of the cause, is to consider "whether the verdict or judgment can be afterwards used, "whether for or against, either as *res judicata* or as *evidence of* "*a fact* in any other action."

Ralston v. *Rowat*, although apparently a case in favour of the appeal, when it is examined will be found to be quite consistent with the judgment in the Court below. The witness had as much interest to defeat the case of the party on whose behalf he was called, as that of the party against whom he appeared, for he could not establish his right as heir of the testator whose will was in question until he had reduced the service of the pursuer of the reduction as his heir, and in such a proceeding the verdict that might be given in the reduction could neither be used for nor against him. But in *Watson* v. *Glas*, a case decided subsequently to *Ralston* v. *Rowat*, the witness tendered by the pursuers of the issue to prove that they were the heirs of the deceased was the aunt of the pursuers, so that, proving the propinquity of the pursuers, she proved her own, and her right as next of kin. An objection to the competency of the witness was sustained by the Judge at the trial of the issue, and his judgment was supported on the hearing of a bill of exceptions. The facts in that case were nearly the same as in the present, and the question of law was identical.

Mr. Wortley in reply.—The report of *Watson* v. *Glas* cannot be depended upon—the judgment is made to rest upon this, that a service is not *res inter alios*, but *res judicata*, to the effect of being used in any subsequent action as to personalty, a posi-

tion manifestly untenable, as there is no proceeding which has less the character of anything like a judicial determination, and so far from all the lieges being entitled to be present, as Lord Corehouse, the only Judge whose opinion is given at any length, is made to say, none are entitled to appear but those who claim the *status* of heir. But whatever may be the particulars of that case, its decision has not been sanctioned by this House, and is opposed to its solemn judgment in *Ralston* v. *Rowat*, where the principles contended for by the Appellant are distinctly recognised.

LORD CHANCELLOR.—My Lords, in this case, which was heard before your Lordships some time since, I have to submit to your Lordships that the judgment of the Court below is erroneous, and ought to be reversed. The case arose in a suit to reduce a service by which certain parties had procured themselves to be served as heirs to a party deceased. The suit was instituted by persons claiming to be heirs, contending that the service had been improperly made, and therefore seeking to have it reduced. That was met by a preliminary objection, that these parties were not heirs; and to try that preliminary objection, before the parties could be admitted to question the propriety of the service, an issue was directed, "Whether the pur-"suers, Mrs. Ann Wood or Willox, and Mrs. Elizabeth Wood "or Pope, are the nearest and lawful heirs-portioners of Alex-"ander Wood, of Woodburnden, deceased."

Upon the trial of that issue a witness, Elizabeth Wood, was produced, and it appearing that she was the aunt, I think, of the party deceased, or in some way connected with the family, and that in the event of the pursuer being right, and the service being wrong, she would become in future a party entitled as next of kin, an objection was raised to her competency as a witness, and the learned Judge being of opinion that she was not competent, the matter was brought before the Court of

Session, and four of the learned Judges were of opinion that the objection ought to prevail.

Against that decision the appeal is brought to your Lordships' House, and the question now is, whether the witness stood in such a situation as to make her incompetent to be examined upon the issue so directed.

Now, my Lords, if the Scotch law upon this subject were the same as the law of England, the point would not require much argument, because it is quite clear that the result of the trial could not directly affect the interest of the witness, the issue to be tried being whether the pursuers were the nearest heirs of the deceased, whereas the only way in which the witness could be connected with the property was, that in the event of a certain pedigree being established, she would be entitled to a share of the personal property.

My Lords, we had several cases referred to, and there is one to which I am particularly anxious to call your Lordships' attention, because it seems to me that even if it is not directly applicable in point of fact, it clearly establishes the principle upon which this case ought to be disposed of, I mean the case of *Allison* v. *Rowat*, which came to this House from the Court of Session. There the suit was instituted for the purpose of reducing a deed of settlement on the ground of deathbed, by persons claiming to be heirs. A witness was called who stated that the pursuer was not heir, but that he himself was heir; upon which the objection was taken that he could not be examined, and that objection prevailed in the Court of Session, but was reversed when the case came to this House.

Now when the case came to this House, the opinion of this House assumed that upon a subject of this sort there was no distinction between the law of Scotland and the law of England; indeed, it would be very strange if there were, for this is a rule adopted for the purpose of better ascertaining the truth upon subjects of investigation by Courts of Law, and I see that in the

opinions of the learned Judges in the two cases which have occurred before the Court of Session, in arguing upon the law they refer to English authorities, and that they all, whichever view they take, recognize the principle, that the same rule is operative and ought to prevail in the two countries. I mean so far as regards the question under discussion, how far a witness is incompetent on the ground of interest. If that were so, it would lead to the conclusion that this certainly can be no objection to the admissibility of the witness upon the ground of interest. I am not now speaking of the late Act of Parliament, but of the law as it stood anterior to the late Act of Parliament, the Act itself not being applicable to Scotland.

Now, my Lords, in order to see how far this question of interest applies to this witness, we must consider what the course of proceeding was in which the witness was called to be examined. The suit being a suit to reduce the service of the party claiming as heir, as a preliminary step, not for the purpose of deciding the question, but for the purpose of ascertaining whether the pursuers were in a situation to raise the question at all, an issue is directed to enquire whether the pursuers are or are not heirs, that is to say, whether they are in a situation to entitle them to challenge the service obtained by the defender.

Now, I have before said that the result of that trial could not by possibility be used for or against the witness, the witness having nothing to do with the heirship, but claiming a share in the personalty, although the pedigree entitling the pursuers to sue in this action might be the same which would entitle the witness to claim a certain portion of the personalty. It is not attempted in argument to show that the result of the trial of that issue in which the witness was proposed to be examined, could be used directly for or against the witness, but the argument stands thus, although the result of that trial could not be used directly for or against the witness, it would lead probably

and indeed would certainly lead to this result in the suit itself, that it would reduce the service of the defender; now that would not at once operate for or against the witness, but it might come circuitously into operation for the witness in this way, if after that had been accomplished the witness instituted a suit under a different jurisdiction, for the purpose of establishing her heirship as entitled to a portion of the personalty, that would raise a question as to the pedigree under which she claimed, being the same as that under which the pursuers in this suit claimed. Then it is said, if she were to seek to establish her title, it is clear that though this would not be direct evidence for her in proof of her own case, yet if it were not for the judgment that might be obtained in this suit, the retour might be produced as evidence to rebut the pedigree under which she claimed; and in order to get rid of the effect of that piece of evidence, the judgment which might be obtained in the suit pending, in which the issue was directed, might be produced; so that the result is that the effect of the verdict which might be obtained, if it should be obtained by means of the evidence tendered, or at least to which the evidence tendered would contribute, would be ultimately and circuitously to make it a piece of evidence, which, as the matter now stands, it could not by possibility be.

My Lords, it is quite clear that that is not a species of interest which would prevent the witness from being a competent witness.

Then there is *Watson's* case, which it is said raises very much the same question. My Lords, I do not enter into that case, it is a very recent decision of the Court of Session, and if the Court of Session have come to an erroneous conclusion in one case, it is not much to be wondered at that they should have come to a similar conclusion in a case which was but a very few years antecedent to it. In fact, the conclusion to which they came in *Watson's* case, has probably led to the very

error which they have fallen into in the judgment upon which we are now to pronounce our opinion in the present case. *Watson's* case is not a case of sufficient standing to show that the law of Scotland upon this subject is different from the law of England. But with respect to the other case that was cited, of *Allison* v. *Rowat*, I think that we are bound by the principles laid down there, from which I have no disposition to depart, and which places the law of Scotland on the same footing as the law of England in a matter of this sort, as to the incompetency of witnesses upon the ground of interest, and if there were any balance between the two cases, the decision in the case of *Allison* v. *Rowat*, being a decision of this House reversing a decision of the Court of Session, which involved the same objection as the present, would settle the question, and therefore I cannot think that the case of *Watson*, which was relied upon by the Court of Session, ought to induce your Lordships to do otherwise than adhere to the principle laid down in *Allison* v. *Rowat*, and establish the principle that the law which prevails in this country upon the subject is also applicable to Scotland.

I therefore move your Lordships that the judgment of the Court of Session be reversed, and that a new trial be directed.

LORD BROUGHAM.—My Lords, I am of the same opinion. It appears to me that the Court below has been misled, partly by *Watson's* case and partly by their Lordships not having formed a perfectly clear and accurate notion of the objection of interest in the question, as distinguished from interest in the event, which ought to exclude, and in England would have excluded, a witness prior to Lord Denman's late Act, and which in Scotland is still an objection to the competency of a witness.

My Lords, when I say that their Lordships did not seem to me to have formed a perfectly clear notion of the objection

raised, I go upon this, that the three learned Lords who chiefly refer to the case of *Watson*, *Lord Mackenzie*, *Lord Cockburn*, and *Lord Fullerton*, and even *Lord Jeffrey* (though he differed from the judgment of the rest), all consider that but for the case of *Watson* it would have been a case of difficulty. I see no difficulty in it whatever. *Lord Jeffrey* also states that he should have felt still greater difficulty but for that case than *Lord Fullerton*.

My Lords, when I say that there is no difficulty whatever upon the question of interest, as disqualifying a witness to give evidence in the Court below, my meaning is this,—the interest must be not only in the result, in the event of the trial of what their Lordships call the issue of the cause (and not simply an interest in the question), but it must be a direct and immediate interest, and it will not do to say that it removes out of the way, in another case which may possibly arise or may not, a difficulty in the way of the party. If it leaves the case in question, it will not do merely to say that it removes a topic in the argument; that is not an interest which disqualifies a witness, it must be such a direct and immediate interest that he may be said to be swearing for himself, or swearing against an adversary to himself, in any testimony which he gives.

Now the case which I put to the learned counsel in the course of the argument, I do not think was got rid of by observation at all. The argument here is, that the propinquity of the party giving the evidence might come in question in another suit, possibly in another Court, touching the personalty, and that therefore if the witness objected to, and upon whose evidence the question arose, gave evidence one way, namely, against the service, the result would be, that the service could no longer be given in evidence against her possible claim in the other suit; consequently, it was said that she had an interest in giving evidence against the service, inasmuch as she was removing, by

her testimony, a possible obstacle out of her way in a possible suit which she might maintain elsewhere, or in another Court, and *alio intuitu*, this being respecting heirship, that being respecting personal estate.

Now, my Lords, nothing can be more clear than that a party may have an interest in getting rid of a witness, as well as in getting rid of documentary evidence, as a service or a retour. If I am the obligor in a bond, and A. B. is the attesting witness to that bond, and there is no other witness, and it is a bond under twenty years old, and consequently must be proved by the testimony of the witness, nothing can be more clear than that I should have an interest in disqualifying A. B. as a witness. Now before the late Act of Lord Denman, which is an excellent remedial Act, which removed the objection to the competency of a witness arising from a conviction for felony, continuing the objection to his credit but not to his competency, nothing can be more clear than that prior to that Act, if A. B. had been convicted of felony, he could not have been examined as a witness to prove anything, even the execution of a bond. I am called as a witness upon the indictment of A. B. for felony. Can anybody suppose that I could not be examined as a witness because the bond was produced in order to prove that he was an attesting witness, and that therefore I had a direct interest in removing him out of the way? "No," the Court would answer, "this is an indictment for felony, and that question is a totally different one; it is a question respecting the "possible interest which the witness may have in removing out "of his way an instrument which is capable of being given in "evidence against him." No such remote, possible, or contingent interest ever can be allowed to prevail against the demand of the law, which requires a direct, immediate, and certain interest in the party sought to be disqualified thereby.

My Lords, the case of Watson was in the year 1833. Their Lordships in the Court below seem to have been very much

moved by that case. It may be said that in the Court below they were bound by it, they seemed to have thought themselves so, but coming before us, we are not bound by it. But besides that, there is the other case of *Allison* v. *Rowat*, which is still stronger in favour of receiving the evidence, and against the conclusion at which their Lordships have arrived, than the case of Watson was for rejecting the evidence, and in support of the conclusion at which their Lordships arrived. That case was, I believe, in the very same year decided by this House, in the year 1833. Whether it was decided so far before the case of Watson, as to have been capable of having been argued in the case of Watson, I really do not know. The two cases could not have stood together, and your Lordships would not be bound by the case of Watson. Now *Allison* v. *Rowat* is material, as showing not only what the English law would be upon this subject, but it is most material to show that there was no difference between the two systems of jurisprudence in this respect, because the principles of English law were recognized in that case fully and exclusively.

But there is also another ground beside the argument stated by my noble and learned friend. It is not a matter of positive law, but it arises from the old and long established rules as to the reception or rejection of evidence which governed in this country, and the Scotch law is very much the same as the English law in this respect. When we look to old authorities, *Stair* and *Bankton*, we find that they adopt, almost in terms, that well known case of *Bent* v. *Baker*, which distinguishes interest in the event from interest in the question, and which has ever since been held to be the governing law upon the subject, until both interest in the event and interest in the question were abolished, as forming any objection to the admissibility of the evidence, by the salutary and remedial Act of Lord Denman. One can hardly conceive a more direct interest, as far as bias upon a man's mind goes, than there was in the case of *Bent* v. *Baker*;

it was this—the witness was called to negative the sea-worthiness of a vessel in the case of a policy of insurance, or to support some other objection, by which the underwriters would have escaped. Everybody knows that even where there is no consolidation, when there is a question between one underwriter and the assured, substantially one trial decides for all, and therefore the bias is strong on the mind, yet the evidence of any underwriter except the defendent is admissible, upon the principle that there there is only a bias arising from an interest in the question, and not in the event. If there had been a consolidation it would have been different, for the witness would have been a party in the cause.

My Lords, the Scotch law lays down the rule in words which are rather remarkable. It uses the expression that it is not enough that the parties should be *foventes ad consimilem causam* (that is the expression of the old lawyers), but they must have an interest in the event itself, and so far, therefore, the principle of the Scotch law is precisely the same with the doctrine in the case of *Bent* v. *Baker*. Underwriters are not incompetent witnesses for one another. They must have a direct interest in the event of the suit in support of which they are called, to render them incompetent. Therefore, my Lords, I am of opinion that, viewing this case both upon principle and upon precedent, without doubt there is no difficulty in it. I differ from their Lordships in the Court below, who think there would have been a difficulty but for *Watson's* case; and I differ in thinking that *Watson's* case created any additional difficulty; it raises no difficulty at all. If *Watson's* case was cited on the one side, there is the case of *Allison* v. *Rowat*, which is stronger, on the other. The Act of Lord Denman, I believe, does not extend to Scotland. I am sorry it does not. It ought clearly to extend there, for it is just as good law for the one country as for the other, and I hope no long period will elapse before it is extended to Scotland.

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[*Mr. Anderson.*—My Lord, I find that Ralston's case was cited in Watson's case.]

LORD BROUGHAM.—And they tried to differ the two cases.

[*Mr. Anderson.*—Yes, my Lord. Watson's case did not occur till 1837, and Ralston's case was in 1833.]

LORD BROUGHAM.—It is quite immaterial. If this case is wrong, Watson's case was wrong.

LORD CAMPBELL.—My Lords, I am of the same opinion. I think that this was a competent witness for the pursuers upon the trial of this issue. With respect to objections to the competency of the witness on the ground of interest, I apprehend that the law of England and the law of Scotland are exactly the same as the law of England was before Lord Denman's Act. It appears from the authorities in the institutional writers to which my noble and learned friend has referred, that they very distinctly anticipate the rule laid down in *Bent* v. *Baker*—they did show that interest in the question is not enough to disqualify, but that there must be an interest in the event of the suit.

Now, my Lords, when a witness is objected to on the score of interest, it must be on one of two grounds; either that the verdict in accordance with the evidence which he gives, may afterwards be given in evidence for the witness, or that the witness will from the result of the suit directly obtain a benefit if the verdict shall be according to the evidence which the witness gives. Both of those grounds of objection have been made in this case, but it seems to me that neither of them is supported.

Now with regard to the objection that the verdict which may be pronounced for the pursuers might be given in evidence in favour of the witness, I take it that it is quite clear that that is untenable. My Lords, independently of this objection, which is pointed out by the Judges below, if the verdict were

given upon her evidence, although *prima facie* the verdict might be evidence in another case, the single circumstance of its being shown to be upon her evidence that it was given, would be enough to prevent any weight being given to it, but as to that the Judges seem to entertain some doubt, and that is not the ground upon which I rely.

But, my Lords, it is quite clear to me that that verdict could not be given in evidence by Elizabeth Wood. In the first place, the verdict *per se* clearly could not be given in evidence, because the verdict would be merely upon the issue, "whether the pursuers were cousins and nearest lawful heirs-"portioners of Alexander Wood, the deceased;" it is quite clear that that verdict could not be given in evidence.

Then what could be given in evidence? The judgment? No, my Lords. Supposing that the service is set aside upon the verdict pronounced upon the issue, what would be the consequence? The consequence, I take it, would be that the service and the retour would be annulled, would be cassed, would be annihilated, and would be as if they had never had an existence. There would be no occasion to resort to the circuitous process of allowing the service and the retour to be given in evidence, and then to give in evidence to destroy it the judgment whereby it would be cassed. I take it that no professional man would venture to give the service in evidence with a knowledge of the fact that it had been set aside by the solemn judgment of a Court. My Lords, there would be no occasion at all to give in evidence the judgment, showing that the service had been cassed in order to destroy the effect of the service, because the service itself would never be attempted to be given in evidence.

Therefore, in no point of view can the objection be maintained, that the verdict, or the judgment upon the verdict, might be given in evidence in favour of the witness, if she should afterwards bring an action or institute some proceeding

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for the purpose of recovering a share of the personalty of Alexander Wood.

The question, therefore, my Lords, is, whether Elizabeth Wood has any direct interest in the result of this suit, and it is stated in this way, that the result of this suit will be that the service and the retour which are a bar in her way if she should set up her claim to a share in the personalty, would be destroyed by the evidence which she gives. But, my Lords, let me suppose the necessary consequence of this verdict upon the issue to be that the service shall be set aside, (I am not clear that that follows, but I suppose it to follow), what is the consequence? It is merely that she, by her evidence, will get rid of a piece of evidence which would stand in her way if she should seek to recover a share of the personalty. That is the strongest manner in which it can be put, that she is to get rid of a piece of evidence against her, which would not be at all an insuperable objection, but which would stand in her way, and which might be given in evidence if she should institute a process for the purpose of recovering a share of the personalty. It would be very strange if that were to disqualify the witness, because, supposing that the service is evidence upon a proceeding brought by her in respect of the personalty, which the Judges below have not said, but supposing it were evidence, it would not weigh a feather, because these services, though they are receivable, are utterly immaterial; but, my Lords, supposing that it really were substantial evidence, it would only be a piece of evidence. Although the service were set up, she may yet be able to make out her claim to the personalty, and if the service is set aside, she still may not succeed; therefore the service standing or being set aside does not necessarily lead either one way or the other to her recovering or not a share of the personalty. It is merely that she would get rid of a piece of evidence which, perhaps, might otherwise turn the scale against her, that is the whole.

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There is no case in England in which a Court has held that such an interest will disqualify a witness. The interest in the result of the suit must be an interest in the nature of something substantial, something in the shape of lands, or goods, or money, which shall come to the witness, or shall be lost by the witness, as the direct and necessary result of the suit upon the trial of which she is called as a witness.

My Lords, I think that the objection is untenable on either ground, and that the judgment of the Court below ought therefore to be reversed. With regard to the case of *Watson*, I do not think it at all necessary to consider whether it differs or not from the present case, because even if it were on all fours with it, there are other cases which are equally in point, and I should feel bound, having the honour to be where I now am, to say that I should disregard *Watson's* case, because it is practically disposed of, and is contrary to the rule which has been laid down by this House on former occasions.

My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friends, that this judgment ought to be reversed.

LORD BROUGHAM.—I ought to have expressed my total dissent from the doctrine which has been laid down in the Court below, which is a strange and novel one, that upon a verdict being given in one case in accordance with the evidence of the party in another case, but who was in the former case a witness, the Court will consider that the verdict passed upon the evidence of the party himself. It seems to me tobe the most extraordinary doctrine that I ever heard. The Court never can look into the evidence on which the verdict had passed.

Ordered and adjudged, That the interlocutor complained of in the appeal be reversed: And it is further ordered and adjudged, That the

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bill of exceptions referred to in the said interlocutor of the 2nd (signed 3rd) of March, 1847, be allowed, and that a new trial be granted: And it is also further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

JOHN HUNTER—JOHNSTON, FARQUHAR, and LEACH, Agents.

[14*th June*, 1847.]

ANDREW WEIR, formerly one of the teachers of the Kilmarnock Academy, *Appellant.*

WILLIAM HOWIESON CRAWFURD, Esq., and Others, Directors of the Academy, *Respondents.*

Schoolmaster.—Master and Servant.—If a schoolmaster holding his appointment *ad vitam aut culpam*, from the Directors of a body of subscribers, on having notice given him of charges intended to be made against his moral character, and being required to attend before the Directors with the view of giving explanation of the matters charged, refuse either to attend or to give any explanation, that is sufficient *culpa* to justify the charges being entertained, and his dismissal being resolved upon in his absence.

IN the year 1806 it was resolved at a meeting of the heritors of the parish of Kilmarnock, a parish partly landward and partly burgal, that an academy should be instituted in the burgh for general education, to be supported by the voluntary contributions of the inhabitants, and that the parish school and an English free-school previously existing in the burgh should be incorporated in the proposed academy. Accordingly, Thomson, the parish schoolmaster, and Henderson, the teacher of the free-school, were appointed teachers of the academy, and had apartments assigned to them in the building of the academy.

In 1820 Thomson resigned, and in the month of June of the same year the Appellant was, by the directors of the academy, in a meeting of that body, appointed "to fill the "vacancy" occasioned by Thomson's resignation. In September following, the Appellant accepted of "the appointment "as teacher of English, &c., in the Academy of Kilmarnock"

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by signing a minute in the Minute Book of the Directors to that effect, the appointment being "*ad vitam aut culpam.*"

At the time of this appointment there was not any definite constitution of the governing body of the Academy. But a constitution had previously been proposed, by which the body was to consist of the ministers of the burgh *ex officio*, five heritors of the parish as representing the general body, five members of the Town Council of the burgh, five of the subscribers to the Academy, and the chairman of the Merchants' House of the burgh. This proposed constitution was acted upon up to the year 1828, when a change was made to the effect of constituting subscribers of 20*l.*, and the heirs male of their bodies life governors.

The Appellant discharged the duties of the office to which he had been appointed from the time of his appointment without anything having occurred to disturb him in its enjoyment. On the 8th of January, 1844, Gairdner, one of the directors, addressed to the convener of the body the following letter:—"For some weeks past a number of reports and statements "have been before the public respecting our English teacher, "Mr. Weir. Having long taken an active interest, I feel it to "be due to the children, to the future usefulness of the semi-"nary, and to the other teachers in the seminary, that the "reports against Mr. Weir's integrity should be examined into "by the directors. If Mr. Weir is innocent of the charge so "publicly made, he is well entitled to the testimony of the "patrons in his favour. If otherwise, he should be dealt with "accordingly;" and at the same time Gairdner addressed this letter to the Appellant himself:—"SIR, I take the earliest "opportunity of informing you that I have this day requested "the provost, as preses of the directors of the academy, to call "a meeting of directors for Thursday first.

"I consider it due to your long services in that institution "to make you thus early aware that certain charges will then

" be laid before the patrons, which, if admitted by you, or " proved to their satisfaction, will very much affect your present " status in that institution. While it is very probable that " other charges may be made against you, I beg you to under- " stand, that I shall myself propose that a very stringent exami- " nation into your conduct shall be made as regards your duty " as Treasurer for the Schoolmasters' Widows' Fund, and Agent " for the Scottish Provident Insurance Company. I trust that " you will be able to explain away conduct implying great mal- " versation of office." On the same day the Appellant received a letter from one of the directors of the academy, informing him that a meeting of the body would be held on the 10th, for the purpose of investigating charges affecting his character and usefulness.

The meeting referred to in Gairdner's letter was held on the 10th of January; but instead of the Appellant appearing, the clerk of the Academy presented to the meeting a letter from the Appellant in answer to a note sent to him from the meeting requiring his attendance, which was in these terms :—" I " received a monitory letter from Mr. Gairdner on Monday, " which entirely precludes my attending the meeting of directors " to-day, and which would effectually seal my lips if I were " there, *for I cannot hold any verbal communication on the* " *subject.*"

The meeting, however, in the absence of the Appellant, appointed a Committee of three of their body to enquire into the charges and report. The Committee proceeded in the enquiry, and made their report to a meeting of the directors which was held on the 19th February. Upon considering the report, the meeting came to the following resolutions :—" *First*, That Mr. " Weir had been guilty of a very great breach of trust in the " management of the funds entrusted to his charge, as collector " of the Presbytery of Irvine, of the Schoolmasters' Widows' " Fund, and also as agent of the Provident Insurance Company.

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" *Second*, That he has therefore disqualified himself from being " a teacher in the Academy, and that it would be highly im- " proper to retain a person who has exhibited such dishonesty " in a situation of such vital importance to the rising genera- " tion." After these resolutions were adopted, the Appellant was sent for, when they were read over to him, and after some conversation the meeting adjourned, " to afford Mr. Weir an " opportunity of making up his mind whether he will resign " the situation or force the directors to proceed upon the " charges above mentioned."

Another meeting was held on the 26th February, at which the Appellant offered to resign his office upon certain conditions. These conditions were refused by the meeting, and a committee of their number was instructed " to proceed forthwith to serve " the charges of inculpation on Mr. Weir, and full power is " hereby given to the committee to adopt all necessary legal " steps to have him removed from the situation."

In pursuance of this instruction the committee served upon the Appellant a statement of the charges which were made against him. Upon receiving this statement the Appellant, on the 14th of March, wrote a letter to the directors in these terms:—" After services so long, so arduous, so faithful, so " devoted, and so ill-requited as mine have been, your procedure " towards me, in attempting to effect the utter ruin of myself " and family, appears unaccountable, unprecedented, and " astonishing, especially as no charge of incapacity to teach, or " want of diligence in the performance of my duty has been " alleged. I have received from the secretaries what you call " charges of inculpation, which contain much misinformation, " misconception, and misconstruction, with certain allegations " founded thereon. From the tone which was assumed on " former occasions I plainly perceived that it was in vain for " me to attempt anything like an explanation, I therefore most " respectfully decline doing anything further in the meantime

" than to give a general denial to the whole charges as they " stand, and, while I do so, I beg to mention that I have been " advised that you have no right to impugn my character as " a private individual, or to make enquiries into my circum- " stances, and into matters which do not affect the institution " with which I am connected, while my ability and diligence as " a teacher are unimpeached."

Another meeting was held on the same day, 14th of March, at which it was resolved, " That the charges are in no manner " of way *removed* by Mr. Weir's answer. The meeting, there- " fore, conceive that they have no alternative but to *proceed* " *against Mr. Weir, to have him removed from the academy,*" and a committee was appointed to adopt such proceedings for that purpose as should be recommended by counsel.

The opinion of counsel having been obtained, two meetings were held, on the 2nd and 10th of April, at both of which a resolution was carried not to proceed further in the matter in the meanwhile. But at a subsequent meeting, held on the 22nd of April, a resolution was passed deposing the Appellant " from " his situation as teacher in the Kilmarnock academy," and directing notice of this to be served upon him, and requiring him to remove from the school-room and other premises occupied by him.

The Appellant presented a note of suspension of this proceeding. The Lord Ordinary, (*Robertson,*) while he directed the case to be brought before the Inner House, issued a note of his own opinion, which, after detailing the facts of the case, contained these observations:—" The charges preferred against the " complainer, into the truth of which he had thus declined to " enter, either by verbal or written explanation, were of so " serious a description as rendered it impossible that the matter " could be allowed to stand unexplained, consistently with the " honour and respectability of the seminary, and that such a " person, however able and diligent in his vocation, was, if

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"guilty, disqualified by his immorality to continue a teacher of "youth."

"The directors seem to have proceeded with all fairness "and deliberation in the discharge of their duty. And if it be "admitted that they were not bound to take judicial steps, then "it seems to follow, that, after making full investigation by "committee, and serving the complainer with specific charges, "which he refused to answer or explain, they had no alternative "left but to dismiss him from his situation in the institution, "They never could be justified to have continued in his situa- "tion an individual who denied their right to inquire into his "moral conduct, and maintained that their authority in super- "intending the teachers elected by them, *ad vitam aut culpam*, "was limited to enquiry into mere matters of ability and "diligence. It is quite clear that, if the moral character of the "teacher of youth be tainted, his literary qualifications are of "subordinate importance, and that the directors of such insti- "tutions must have power of dismissal on cause shown.—See "the cases of the Ayr Academy, 3d June, 1825, 4 *Shaw*, "63; and Dundee Academy, Murray *v.* Lindsay, 2d July, "1833, 11 *Shaw*, 856."

The court, after hearing counsel, remitted to the Lord Ordinary to refuse the note of suspension.

The appeal was against this interlocutor.

Mr. Anderson, for the Appellant, endeavoured to make two points. 1st. That the Appellant was parish schoolmaster, and as such was amenable to the presbytery of the parish alone, and had not, therefore, been dismissed by a competent jurisdiction. 2nd. That if the jurisdiction were competent the proceedings had not been conducted in such a way as to give the Appellant an opportunity of being heard; that the sentence of deposition had been passed behind the Appellant's back without any enquiry into the truth of the facts alleged, and that this enquiry should yet be allowed.

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In the course of the argument counsel was stopped, as to the 1st point, by an observation from the woolsack, that "neither "in the Appellant's appointment—his dismissal—nor his com- "plaint against the dismissal, was any reference made to an "appointment as parish schoolmaster, and that in the opinion "of the House the Appellant could not be treated as a parish "schoolmaster."

Mr. S. Wortley and Mr. A. McNiell, for the Respondents, were not called upon.

LORD CHANCELLOR.—I think your Lordships will not deem it necessary in this case to hear the counsel on the part of the Respondents, because, upon consideration of the facts that have been brought before us, I arrive at the opinion that no case has been made out by the Appellant.

It appears that the Appellant was appointed as a teacher to the Kilmarnock Academy *ad vitam aut culpam,* and he pleads that what has taken place, has not taken place within the latter of those words. It appears that he had notice from one of the directors to appear before them, (the directors,) at a meeting which was about to take place. That meeting taking place, a note was sent to the Appellant, requesting his attendance. This meeting was in due form. A charge was made, and the party accused was sent for that he might attend. To this he sends the following answer:—"I received a monitory letter "from Mr. Gairdner on Monday, which entirely precludes my "attending the meeting of directors to-day, and which would "effectually seal my lips if I were there, for I cannot hold any "verbal communication on the subject." This is the tone that is assumed by an officer acting under a body by whom he was appointed, and who had a clear right to investigate and ascertain his conduct, in order that they might see whether it was proper for them, as the managers of this institution, to continue him

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in the office of teacher or not. A grave charge is made against him, and he refuses to hold any verbal communication with that body on the subject. Then, he having refused to attend, they clearly had no other resource but to endeavour to satisfy themselves as to the truth of the allegations made. [His Lordship then went through the further history of the case, and then continued.]

The result of this case therefore is, that a teacher of an academy being charged at all events with very grave offences—not in his character as a teacher, but holding other appointments, as he did under other institutions—when he is called upon to explain his conduct in relation to them, in the first place refuses to hold any communication whatever with the parties; he refuses to hold any communication with those parties who are bound to investigate his conduct; and when by proceedings among themselves they had satisfied themselves that this enquiry was of such a nature as to require it to be answered by Mr. Weir, and when regular charges are communicated to Mr. Weir, which he is called upon to answer, he tells them that he will not answer; he tells them that he will enter into no explanation, but that he will content himself with saying that they are not proved; and then he puts forward what has not been attempted to be supported at the bar, that the directors have no right to interfere with, or to enquire into his conduct in reference to any other matter, except in his character as a teacher in their academy.

The question for your Lordships' consideration is whether under these circumstances the directors were bound to continue him in the office of teacher of this academy, or whether they were justified, in that stage of the proceedings, in dismissing him. And I cannot but think that they were not only justified in dismissing him, but that they were bound to do so. These charges having been made, he refuses to answer them; he refuses to accede to the jurisdiction which, by accepting office

under them, he had acknowledged. If he committed a fault, the jurisdiction to try that fault was the directors under whom he was acting; but he refuses to come to any explanation. Is not that of itself a *culpa* upon the part of a person who is bound to submit to that jurisdiction?

The question was not whether he was to be subjected to any punishment by the course that has been adopted, but the question was whether he was to be continued in his appointment as teacher of this academy by those whose authority he would dispute. I cannot help thinking that for the purposes of conviction there was quite sufficient evidence to make it the duty of the directors to consider that in the course of conduct he had pursued he was rendered unfit for the office that he held, that he had by his conduct been guilty of a *culpa* within the meaning and understanding of that term in Scotland, and that they were justified in voting for his dismissal. I therefore submit to your Lordships that this appeal be dismissed.

LORD BROUGHAM.—I take the same view entirely with the noble and learned lord who has just sat down. My Lords, I am perfectly clear that to call this a public office, and to say that the Appellant is a parochial schoolmaster under the Act of 1803, the 43rd of George the Third, is perfectly out of the question. It is a matter of contract; he is appointed upon particular terms and in a particular manner, and the contract is that he shall hold his office *ad vitam aut culpam.* That must be taken with reference to the nature of the office, and that which would be a malversation, a *culpa* in such a party, in a schoolmaster—might very possibly not be a *culpa* in any other person.

Now, what are the facts, and upon what ground alone is it said that this officer should not be dismissed? It is said that the charge being made against him, he had not a due and sufficient opportunity of answering it, and that the parties, his mas-

ters and employers, by a secret proceeding, enquired into his conduct. In my opinion, the letter of the 8th of January, 1844, was quite sufficient notice. If a schoolmaster is charged with a grave crime, it is not necessary that he should receive a formal written copy of the indictment, summons or libel; but if he receives that which brings to his knowledge that there is a charge against him, is it for him, instead of coming before those who are bound in the discharge of their duty, as directors, to exercise discretion, and to see that a proper person fills that important place, is it for him, instead of coming before them and giving an answer, to say, "My lips are sealed; I will not "acknowledge you as my superiors; I can hold no communica-"tion on the subject of my conduct with you." I consider that is *culpa* sufficient of itself to warrant their proceeding upon it, not merely as an act of obstinacy, (that is not the point,) but as not showing that due readiness to give an explanation, or to state a defence in justification of his conduct, when called upon in the way that my noble and learned friend has pointed out.

He having had the opportunity of explaining his conduct if he thought fit, I consider that his refusal to do so is sufficient ground for what has been done by the Directors. No summons, no judicial proceeding is at all requisite; but sufficient knowledge is to be given, and sufficient opportunity is to be afforded, to enable the party to meet the charge. In my opinion, both those matters exist in this case, and I therefore think that the Appellant was wrong, and that the Directors were right.

Now, Lord Cockburn, who does not in the smallest degree excuse the party, differs from the other members of the Court, and differs from myself upon the subject, inasmuch as he thinks that the party, in a certain sense, was right in refusing to come into the proceedings of the Directors, and in refusing to come to the appointed meeting; and that though he perhaps acted unwisely, yet that was not enough. But I deny that it was merely an act of imprudence on his part. I think it was a

wrong act; and I think it was an act to justify a grave suspicion in a schoolmaster, who is like a confidential clerk, or confidential servant or agent—a steward, for instance—and it is not to be contended, though there is a contract, that he should be continued as long as he behaves well in his office—that if he conducts himself in such a manner as to give rise to a charge, and that charge being made,—if by his obstinate refusal to give any explanation, or to take advantage of the opportunity of making any explanation or defending himself, he gives countenance to that, (for in the domestic *forum* in which these tribunals act, and in which these examinations are conducted in Scotland, at all events, he had an opportunity of defending himself). There is, I think, sufficient *culpa* to justify the parties in taking these proceedings. It is a mere matter of contract; he is not a public functionary; he is to be viewed in the light of a clerk or a steward, and is to be amenable to those who employ him.

LORD CAMPBELL.—My Lords, I cannot help feeling very much about this unfortunate person. It is possible that he may be innocent—it is possible that he may be a meritorious teacher, and that he might be of service to the town in which he has exercised his profession for a considerable number of years; but really as to the merits of this appeal, I think that they are entirely groundless.

In the first place, it was wholly in the distress of the case, and from feeling no confidence upon other points, that Mr. Anderson could have contended that this was a case for the Presbytery. There was not the remotest notion of that even in the mind of Mr. Weir himself—there is no ground for the supposition that he was appointed as a parochial schoolmaster, or that when he was appointed he had anything like the remotest idea to that effect. He was appointed the master of this academy and by the directors, who were the parties to determine whether he duly demeaned himself in the office to which he was appointed.

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If there had been any proceedings against him in the Presbytery as a parochial schoolmaster, the very terms of his appointment would have been fatal to the jurisdiction of the Presbytery.

This, therefore, is a mere matter of contract; and the question is whether the contract has been broken on the part of the directors.

Now, certainly, if they have engaged him *ad vitam aut culpam*, they have no right vexatiously to remove him; there must be a breach of trust, *a culpa*, or he he is entitled to remain for life.

But then who is to be the judge of that *culpa?* Setting aside the view of his being a parochial schoolmaster, it is allowed that the directors are the proper judges. Very well, then, his moral conduct must be considered; and that notion which unfortunately entered into Mr. Weir's mind, that the directors had no right to enquire into his conduct, except in so far as regarded his conduct in the school, is wholly groundless; and I think, indeed, it is not denied that the offence imputed to him, if it really was committed, and if proper proof was given of it, would be a ground of dismissal, it would be a gross breach of trust, a thing peculiarly wrong.

Then, that being so, the question is whether he has had a fair opportunity of justifying himself from this imputation. I do not say that before such a domestic tribunal you are to proceed by summons, and answer, and so on; that would be quite absurd. You ought to proceed fairly, and one ingredient in that mode of proceeding is this, that the party accused is to attend and to be examined, and to explain, and to give answers to the questions put to him, so that the consciences of the directors may be duly informed, and that they may be enabled satisfactorily to perform their duty.

This, then, being a sufficient charge, a charge proved, and justifying his removal, again and again he might, and even after what is called the sentence against him, (for it looks somewhat

like a proceeding at law, where the rule *nisi* is made absolute, unless cause is shown to the contrary,) he might then have come, and he would have been heard, and even then he might have cleared himself from the imputations that were cast upon him. But he sets them all at defiance, and he will give no explanation of the allegations against him. I therefore apprehend that where under such circumstances there is such an appointment *ad vitam aut culpam*, and where those, who are the judges of the conduct of the party appointed, give him notice of the nature of the charge brought against him, which charge, if proved, substantially justifies his removal, and he refuses to give any explanation, the directors are perfectly justified, and indeed bound to proceed to his removal. Under these circumstances, I think they were fully authorized in point of law, and I give my judgment accordingly.

EDWARD PRITCHARD—DEANS, DUNLOP, and HOPE, Agents.

[*22nd June*, 1847.]

THE MOST NOBLE THE MARQUIS OF TWEEDDALE and his COMMISSIONERS, *Appellants*.

DR. JOHN MURRAY and Others, *Respondents*.

Tack.—Lease.—Where the covenant by the tenant for removal from a farm under a liferent lease fixes the removal at a period subsequent to the death of the tenant for life, that does not *per se* entitle the representative of the tenant to cultivate the farm during the period between the death and the term for removal, in the absence of anything else to give a title of possession after the death of the tenant for life.

ON the 27th of September, 1759, the Marquis of Tweeddale let a farm to James Murray, "secluding all assignees of whatsoever kind, and that for all the years and space of three nineteen years, and lifetime of the said James Murray; and in case of the death of the said James Murray before the expiration of the third nineteen years, for the lifetime of his heir who shall be in possession at the end of the said third nineteen years, his entry thereto being hereby declared to have been and begun at the term of Whitsunday last, notwithstanding the date hereof, and from thenceforth to be peaceably possessed, laboured, and manured by the said James Murray or his heirs, secluding assignees, during the haill time and space above mentioned."

By a subsequent clause in the lease, the tenant, after binding himself to pay the rent, keep the premises in repair, and grind his corn at a particular mill, further bound himself, his heirs, executors, and successors, "to maintain and uphold the haill houses belonging to the said roum and lands during this tack, and to leave the same in a good and habitable condition at

"the expiration thereof;" and to pay the rent of the lands at the terms of Candlemas and Lammas in each year, beginning the first payment at Candlemas 1760, and "to flit and remove "themselves, cottars, servants, and subtenants the Whitsun- "day next and immediately after the expiration of their tacks, "without any warning or process of removing to be used to "that effect."

The original tenant possessed the lands during his life, and was succeeded by his son, who died on the 8th of March, 1845. After his death the Respondents, his representatives, were proceeding to plough up and sow parts of the farm, as if the lease were still continuing, when the Appellants presented a note of suspension, praying that they might be interdicted from so doing.

The Lord Ordinary (*Ivory*) granted the interdict asked; but the Court, upon a reclaiming note, altered the Lord Ordinary's interlocutor, and recalled the interdict.

The Appeal was against the Interlocutor of the Court.

Mr. Turner and *Mr. Anderson* for the Appellants.—The rights of the tenant under the lease are to be looked for in the granting clause; there the lands are let for the life of the heir in possession at the expiry of the third term of nineteen years. Upon the tenant for life's death all title is at an end, and there is nothing which in that clause gives any right of possession to his *representative*. There is no demise to him of any kind under which he can pretend to be a continuing tenant from the time of the tenant's death. From that time, whatever may be his right to continue in possession for the purpose of removing his effects, he is a casual possessor, without any better title to the use of the land than an entire stranger, and might be summarily removed.

If there is nothing in the clause of demise which supports the Respondents' claim, they cannot derive any aid from the terms in which the obligations undertaken by the tenant are

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expressed. These are in favour of the landlord and against the tenant, and cannot enlarge the terms of the demise, Strickland *v.* Maxwell, 2 *Cro. & Mees.*, 539; Pritchard *v.* Dodd, 5 *Bar & Ad.*, 618. But if it were allowable to look at the covenants by the tenant, in order to qualify or enlarge the demise by the landlord, the terms of the covenants would not assist the claim. The covenant is, to remove "the Whitsunday next and imme- "diately *after* the expiration of thir tacks." In terms, therefore, though the removal was to be at Whitsunday, the lease had expired previously, and the expiry cannot be referred to anything but the death of the tenant for life. The purpose obviously was not to give a prolongation of the lease to Whitsunday, for that would have been directly to contradict the terms of the demise, but to fix a definite time at which the landlord should have a right to enter to the lands freed of the tenant's effects, and of his cottars and under tenants, without the necessity of giving any warning. Although since the date of this lease it has been settled that warning does not require to be given to the heir of a tenant for life, Tennant *v.* Tennant, *Mor.*, 13845; Gordon *v.* Representatives of Michie, *Mor.* 13851; Stewart *v.* Representatives of Grinmond, *Mor.* 13853; yet at the time this lease was executed it was thought that this notice was necessary. *Ersk.* II. 6-49.

At all events it is now necessary, as it was at that time, to give warning to the under tenants, and the covenant for removal at Whitsunday without warning was framed evidently with a view to prevent all questions as to warning, either by the heir of the tenant or by his representatives, and at the same time to afford convenient time for removing, so that while the use of the lands was to cease with the tenant's life, actual removal from them was to be delayed until the Whitsunday following, and that is all that the tenant's heir can claim under the lease.

Mr. Stewart and *Mr. Hunter* for the Respondents.—The entry to the farm was to be at Whitsunday, 1759, and the first

payment of rent was to be at Candlemas, 1760. The tenant, therefore, paid rent at Candlemas, 1840, and his representative would be bound to pay another half-year's rent at Lammas, 1845. If the doctrine of the Appellants prevails, the tenant would not have any use of the land in order to provide for this last payment; but the House will not, unless compelled, yield to a construction which would operate such injustice.

Although the particular year in which the lease was to terminate could not be ascertained, the *period* of the year was ascertained by making it at the same term as that with which the lease commenced, and the object of this was obviously to give the tenant a right to sow the land for the last year of his possession, as he had not had any crop for the first year. The lease therefore is to be read as commencing at Whitsunday, 1759, and ending at Whitsunday after the death of the tenant for life; as a lease for whole years and not for portions of a year, with a corresponding obligation for payment of rent for entire years; so that if the tenant died on the 24th of May, his possession would end with his life, but if he died on the 27th of May, the possession by his heir would continue until the Whitsunday following, and the payment of rent would be accordingly.

No doubt the leasing clause is limited to the life of the heir in being at the end of the third nineteen years, and if there had not been more, unquestionably, upon the heir's death, his title of possession would have been at an end, and his representatives would have been liable to summary removal. But to prevent this consequence, which would be as unjust as it would be inconvenient to the tenant, the obligation to remove is put at a term, which, in whatever year the tenant might die, would continue the possession by his representatives till the end of that year. The entry was at Whitsunday, and the removal was to be at Whitsunday.

Till Whitsunday, then, the tenant was not bound to remove,

and of course till Whitsunday he was entitled to possess, and being entitled to possess, he was also entitled to enjoy by ploughing and sowing the land. The covenant is not to remove from the houses alone at Whitsunday, and from the lands at an earlier period; the covenant is to remove from the whole farm at Whitsunday; there is nothing, therefore, upon which to found an argument for a qualified possession between the death and Whitsunday.

If this be so, there is nothing in the Appellant's argument as to the terms of the demising clause; it is not necessary that the different parts of a lease should be arranged according to a particular collocation; it is enough if the matter relied upon is to be found within the instrument. The lessor, like the lessee, is party to the whole instrument. The lessee grants the covenant to remove at Whitsunday, but the lessor accepts it. It may well, therefore, be read along with and as part of the leasing clause, to shew the lessor's meaning of the terms used in that clause.

The cases cited for the Appellants establish that, in simple liferent leases, the representatives of the tenant for life are liable to be summarily removed upon the death of the tenant, though the death should occur between terms, the title of possession expiring with the life. If the lease, therefore, was intended to expire with the life of the tenant, there was no necessity for a covenant to remove; but in order to provide against this obvious inconvenience, the covenant to remove at Whitsunday was inserted in the present lease. The case of the Appellant in *Hay*, 17 *Scot. Jur.* 198 shews, moreover, that the Appellant was in the habit of having similar clauses introduced into his other leases, and that the object of doing so was that which has been stated. That Whitsunday, and not the death of the tenant for life, was to be the expiry of the lease, is further shewn by the covenant to uphold the houses, and leave them in a habitable condition "at the expiration" of the lease.

This could not be meant to be the death of the tenant for life, for unquestionably the representatives of the tenant were entitled to possess the houses until Whitsunday following the death, and if that had happened one day after Whitsunday, there would have been a year until the following Whitsunday, during which the tenant would not have been under any obligation to uphold or repair—a state of things which plainly could never have been intended.

Moreover, although assignees are secluded by the terms of the lease, subtenants are recognised, both in the thirlage and the removal covenants. They would not be bound to remove until Whitsunday, and as to them also, if the lease expired at the death, there would, in the case supposed, have been a year during which they could have avoided the thirl. Nay, if the tenant had died within forty days prior to Whitsunday, so that warning for that period anterior to Whitsunday could not have been given, the subtenants would have been entitled to possess until the Whitsunday following, for the covenant to remove would not entitle the landlord to eject *brevi manu*, without giving forty days warning specified by A. Sed. 1756, or the statute 1756; Perth *v.* Andrew, *Hume's dec.* 562; Lockhart *v.* Twaddell, *Hume's dec.* 564.

LORD CHANCELLOR.—My Lords, The facts of this case lie in a small compass. The main question is, what is the construction which is to be put on the lease of 1759? I have looked into the lease and into several cases which have been referred to, some of which bear materially upon the question now to be decided, and it appears very clearly that this case depends entirely upon the construction to be put upon the lease.

There are rules of construction of universal application, shewing that where terms are used, which may be full of ambiguity, they can have no meaning put upon them inconsistent with the other parts of the instrument—that the one part of an

instrument cannot be construed to be opposed to the other. Those rules are applicable in this case, and the two parts of this lease cannot be construed inconsistently with each other. It appears to me, therefore, that notwithstanding the great authority of the three learned judges whose opinions have been expressed in favour of the Respondents, there can be no difficulty, applying the principle of those general rules of construction, in your Lordships' coming to a safe conclusion upon the matter of this appeal.

It must be borne in mind that the earlier part of this lease is a taking by the tenant of this farm, which he is to rent for a certain time. By the latter part, the tenant obliges himself to do certain things. By the terms in the former part of it, the lease is made to continue "for all the years and space of "three 19 years, and lifetime of the said James Murray, and "in case of the death of the said James Murray before the expi- "ration of the third 19 years, for the lifetime of his heir, who "shall be in possession at the end of the said third 19 years, his "entry thereto being hereby declared to have been and begun "at the term of Whitsunday then last, notwithstanding the "date hereof." By the second part of this lease, James Murray bound himself, his heirs, executors, and successors, to pay a certain annual rental during the respective first, second, and third terms of 19 years, and lifetime. "And the said James "Murray thereby bound and obliged himself and his foresaids "to flit and remove themselves, cottars, servants, and sub- "tenants the Whitsunday next and immediately after the ex- "piration of their tacks, without any warning or process of "removing to be used for that effect."

The question as to the construction of this lease, is whether it expired with that life in March, or whether it continued until Whitsunday following. This is apparently a very unimportant question, but practically it is one of great importance, because upon that depended the right of the tenant to put

crops into the land in the month of March, so as practically to make the lease continue during the time of the growing of those crops sown in March, and until the tenant had an opportunity of reaping them.

Now, the question we have to consider here is, when the landlord granted that lease to expire. He granted the lease for the term of three 19 years, and the lifetime of the tenant's heir who should be then in possession, and he granted no more. The question is, whether that was strictly what was meant, because the event of the death of that life-tenant must have been contemplated to happen, and it must necessarily have been, that when this life dropped (unless Whitsunday fell on the very day of his death) some period would elapse between the cropping of the land and the subsequent Whitsunday. Did the parties then mean that the lease should continue after the expiration of that life, until the next Whitsunday? Because if so, I apprehend the grant would not have been simply for the life of the heir of James, but the grant would have been to the heir of James and until the Whitsunday next following. But in that portion of the lease which professes to grant to the tenant, there is no reference to the continuance of the lease beyond the expiration of the 19 years and the lifetime of the heir. But on the other hand, the tenant agrees (and here the undertaking is from the tenant) for himself and his foresaid, "to flit and remove "themselves, cottars, servants, and subtenants, the Whitsunday "next and immediately after the expiration of their tacks," the Whitsunday that shall follow after, not the death of the tenant for life, but the Whitsunday that shall follow after the expiring of the tack.

The parties could not possibly have entered into a deed like this without having had present to their minds the fact that the lease was to expire at a given time. Then there are two constructions which are put upon this—the one, that the lease expired immediately upon the death; the other, that the intention

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was, that the lease should run till the Whitsunday following the death. But the early part of the lease, which is to be regarded as giving the interest derived from the landlord, is totally silent upon this latter point, and is not only silent upon it, but in terms expresses that the occupancy shall be until the death of the tenant for life, or of his heir. There is found therefore upon the face of this deed, a provision totally inconsistent with the idea of its continuing after the death of that life until the Whitsunday next following. The very clause upon which the Respondents rely, that which constitutes the only ground they have for the argument for the continuance of this lease, assumes that the period of the removal of the tenant is to be at the expiration of the tack. The latter part of the clause is that the removal shall be "the Whitsunday next and immediately after "the expiration of their tacks," which, in the former part of the lease, is stated to be "in case of the death of the said James "Murray before the expiration of the third 19 years, for the "lifetime of his heir who shall be in possession at the end of "the said third 19 years." So that, in point of fact, it can hardly be said that the main points of the deed are inconsistent with each other, because the expiration of the lease is as consistent with the one part of the deed as with the other.

On the other hand, is there anything inconsistent with the rest of the lease in providing that although the lease should expire at the time specified, and, therefore, that the tenant *qua* tenant should no longer have any fixed interest in possession under the lease after the expiration of the lease, yet he shall not be called upon to remove himself, (which, at a moment's notice, might be attended with great inconvenience,) for a certain time. That is not only not inconsistent with the provisions of the lease, but it is common to all leases in this country; but it is confined to the permission to occupy a certain portion of the land, for a period subsequent to the expiration of the lease, for the convenience of the tenant, to enable him to remove his

property and other matters, without being obliged personally to remove at the particular day. And that is of the more importance here as this lease was to expire not upon any day the tenant might be provided for, and where, therefore, he might be called upon without any notice to give up possession of the farm and remove himself and family. I see no inconsistency in making such a stipulation. The very terms of the provision show that what was in contemplation was a time to be fixed at which the property was to be cleared and given up. And no question appears to be raised as to the next heir to the tenant remaining merely in residence on the farm till Whitsunday after the death of the life-tenant, but the question raised is as to his actually entering upon the cultivation of the farm.

The lease contemplates the event of a part of the land being underlet, and if that land were underlet then, notwithstanding the tenure of the tenant for life, the tenant upon the land so underlet would not be subject to removal without warning. The provision is one fixing the time at which the party concerned as under-tenant, or claiming under him, should personally remove from the property. Now it has been considered that this provision was tantamount to a contract for retaining the possession of the farm, but I do not find any phrase in this provision which connects itself with the possession of the farm as such; they are to quit and remove themselves, their cottars, servants and subtenants, and they are to give up possession of the farm at and from that period.

But it was asked if the lease was to expire in March or at any other time, and the tenant was to remove and give up possession, and the period at which he was to leave the farm was a period subsequent to the expiration of the lease, was he during that interval to keep the property in repair? The words do not mean, as I understand them, that the next heir shall quit personally the possession and leave the premises, but that he shall surrender, give up, and quit possession, that he shall, upon

the expiration of the lease, leave the farm, that is, hand it over to his landlord in a proper state of repair. That is quite consistent with a provision whereby the landlord wishes to guard himself against the necessity of giving warning, that at a particular period the tenant should not be permitted longer to remain.

In endeavouring to make the different parts of the lease consistent with one another, I have felt the force of the doubt that suggested itself to the minds of the learned Judges below, but I am of opinion that it is inconsistent with the terms of the lease to consider that they operated so as to entitle the tenant to retain possession for the purposes of another crop. Therefore, for the reasons I have stated, I have to move your Lordships that the decision of the Court below be reversed, and that the Interlocutor of the Lord Ordinary be restored.

G. and T. W. WEBSTER—SPOTTISWOODE and ROBERTSON, Agents.

[*8th July*, 1847.]

The Right Honourable ARCHIBALD WILLIAM, commonly called LORD MONTGOMERIE, eldest son and heir of the Right Honourable ARCHIBALD M. HAMILTON EARL of EGLINTON and WINTON, and the Right Honourable LADY EGIDIA MONTGOMERIE, only daughter of the said Earl, by their father as their administrator in law, and by their curator *ad litem*, *Appellants*,

AND

The Honourable SETON M. HAMILTON, second son of the said Earl, compearing, *Appellant*.

The said EARL of EGLINTON and WINTON, *Respondent*.

Tailzie.—Found that an heir of entail to whom the estate is conveyed, with all the powers given to the heirs generally, but under a condition applicable to him in common with the other heirs, that on the happening of a certain event, the lands shall devolve upon another person, has until the occurrence of the event every power to deal with the lands which a proprietor has, except in so far as expressly restrained by the terms of the deed.

IN the year 1763, Robert Hamilton, who at that time had four daughters and no sons, executed an entail by which, after successive destinations in favour of his three eldest daughters, and the heirs male of their bodies, he conveyed his lands to his fourth daughter, "Eleanora Hamilton, and the heirs male to be "procreate of her body, whom failing, to the nearest heir male "descended of the body of George Lord Lindsay," his grandson, "excluding always the person possessed of the peerage of "Crawfurd and his apparent heirs in the said peerage, and "failing all other heirs male of the said George Lord Lind-

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" say, to the peer himself, who shall be obliged to denude in " favour of his own second son upon his existence, in the " manner as is after herein provided as to other heirs who " may succeed to the peerage."

The entail, after a condition upon the heirs to bear the name of Hamilton, contained a prohibition " to sell, alienate, " or impignorate the said lands and estate, or any part thereof, " either redeemably or under reversion," or burden it with debt, and after fencing these conditions and prohibitions with irritant and resolutive clauses, it contained a clause in these terms:—

" Moreover, it is hereby declared and specially provided, " that if it shall happen that the said Robert Lindsay, or the " heirs male of his body, or any other heirs of tailzie, shall suc- " ceed to the peerage and dignity of the Earl of Crawfurd, " or to the peerage of Viscount of Garnock, or to any other " peerage whatsoever, or to any estate entailed under a con- " dition that the heir shall take the name and arms of the " family thereby represented, and none other:

(1.) " In all and every one of these cases, the heir suc- " ceeding to a peerage, or to any estate entailed, when he is " possessed of my said estate, or succeeding to my said lands or " estate, when he is possessed of a peerage, or estate entailed as " aforesaid, shall *ipso facto* forfeit all right, title, and interest " to my said lands and estate, *and that not only for themselves,* " *but for all their descendants, as long as any heirs male of the* " *bodies of my daughters shall exist,* and my said lands and " estate shall devolve and belong to the next heir of tailzie " called to the succession after the said excluded heir and des- " cendants, who shall make up his titles thereto by declarator, " adjudication, and any other manner in law competent, in " the same manner as if such excluded heir and his descendants " were not existing: And in case the person thus succeeding, " *through the exclusion of prior heirs,* or any other substitute,

" shall thereafter succeed to a peerage, or to an estate entailed " under the condition above mentioned, he shall in like manner " *ipso facto* forfeit his right to my said lands and estate, for " himself and all his descendants, and the same shall fall and " devolve to the next heir of tailzie not descended of his body, " in the same manner as if he and his descendants were all " naturally dead.

(2.) " And it is further provided, that the person succeeding " to my said estate, *by the exclusion of such peer or possessor of* " *an entailed estate,* and the other heirs to him substituted, " shall *not* forfeit their right to the same by existence of " nearer heirs, but the said lands shall remain with him and " the after substitutes as long as there shall exist any other " heirs male descended of the bodies of any of my said " daughters: But *failing all other such heirs male,* the *succession* " of my said lands and estate shall *fall and devolve* to the " nearest heir male descended of the body of such peer or ex- " cluded heir, in the order above specified, excluding always " the person possessed of the said peerage at the time, and all " his apparent heirs therein; and *failing all other heirs male* of " the bodies of my said daughters, the lands and estate shall " then *fall and devolve* upon the person possessed of the " peerage or estate entailed as aforesaid, and shall remain with " him until he or his heir-apparent shall have a younger son, " who is not apparent heir in such peerage or estate, and such " younger son or sons successively shall, on their birth, have " right to my said lands and estate, exclusive of the prior " heirs, so that the estate shall at no time remain with a peer " or possessor of lands entailed under the above condition " while there are any other heirs male descended of my daugh- " ters' bodies who can take up my estate, and keep up a " separate representation of my family."

In the year 1817, by the death of the last of the three eldest daughters of the entailer without issue, the succession

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under the entail opened to the heir male of the body of the fourth daughter Eleanora, who had pre-deceased the last of her sisters. This heir male was the Respondent, the grandson of Eleanora by her last surviving son, who had pre-deceased herself. The Respondent, who was then a commoner, made up titles to the entailed lands by special service and infeftment, in the autumn of 1819.

In December, 1819, the Respondent succeeded to his present title of Earl of Eglinton, by the death of his grandfather, the husband of Eleanora.

In 1833, the Respondent, by the death of Lady Mary Lindsay Crawfurd, became the heir-at-law of the entailer. On the 17th February, 1841, he married for the first time. In 1843, he sold part of the entailed lands to the Appellant by missive of sale, which contained the following proviso:—"Whereas the said "James Morton or his foresaids may on the ground of alleged "want of title in the said Earl to sell the said lands and others, "and to discharge the said price, raise an action of suspension of "any charge or threatened charge for payment of the said price, "or institute other legal proceedings in relation to the said Earl's "powers of sale; and whereas, in case it shall be found in the "said action of suspension, or in any action of declarator, or "other judicial procedure to be raised in relation to the premises or in relation to any other lands contained in the said "deeds of entail, that the said Earl is not entitled to sell the "said lands and others, or any of the other lands contained in "the said deed of entail absolutely and irredeemably, not only "would any infeftment or other real right in the said lands, and "others obtained from him, be liable to be reduced and set "aside, but the Earl himself might be exposed to an action "of declarator of irritancy of his own right to the said lands and "others: therefore, it is hereby provided that until it shall be "judicially determined, in the manner that shall be adjudged "satisfactory and sufficient by counsel, to be mutually named

" by the said parties, in any action of declarator, process of " suspension, or other judicial procedure, at the instance of " either of the contracting parties, or in any proceedings at the " instance of any other party in relation to the sale of any other " lands contained in the said deeds of entail, that the said Earl " has power to sell and alienate the foresaid lands and others, " or any of the other lands contained in the said deeds of entail, " he, the said Earl, shall not be bound to infeft and seise the " said James Morton and his foresaids in the said lands and " others, nor to grant any disposition of the same: and until a " decision to the effect foresaid shall take place, these presents " shall not form or be capable of being used as the ground or " warrant of any adjudication in implement or other process at " law whatsoever under which a real right in the foresaid lands " and others may be obtained or constituted in the person of " the said James Morton and his foresaids; and in case any " suspension or action of declarator, or other judicial pro- " ceedings to be raised as aforesaid by either party, or by any " other party in relation to any other lands in the said deeds of " entail, it shall be decided that the said Earl is not entitled to " sell the foresaid lands and others, or any of the other lands " contained in the said deeds of entail, then and in any such " event, these presents, with all that may have followed " thereupon, shall become extinct, void, and null, and of no " force, strength, or effect whatever, in like manner as if the " same had never been entered into: and the said James " Morton and his foresaids shall not be entitled to any damages " from the said Earl or his representatives, on the ground of " non-implement of the bargain, or on any other account " whatever: as also the said James Morton and his foresaids " shall be bound and obliged, if required by the said Earl, to " renounce and discharge all right, title, and interest which he " has or may claim or pretend to the said lands and others, or " to any part thereof: and in case the said James Morton

" and his foresaids shall have entered to possession of the said " lands or any part or portion thereof as proprietor thereof in " virtue of these presents, he shall be bound and obliged to cede " and give up such possession to the said Earl or his heirs of " taillie under the foresaid dispositions and deeds of entail, " who shall be entitled to enter to possession of the said lands " and others in the same manner as if these presents had never " been entered into: and on the other hand, in case the said " Earl shall have received the price of the foresaid lands and " others after stipulated, or any part thereof, he shall be " bound and obliged to repeat and pay back the said price, or " such part thereof as he may have received, with interest on " the same at the rate of four per cent., from the time when he " received the same until the same shall be repaid, and with the " whole law expenses of every description incurred by the said " James Morton or his foresaids in consequence of his having " purchased the foresaid lands and others, whether such ex- " penses shall have been incurred in regard to the arrangement " of the purchase or to the conveyance of the said lands and " others, or to any legal proceedings which may be instituted " by the contracting parties, or either of them, or in renouncing " his title to the said lands, such expenses being charged as " between agent and client, and not as between party and " party."

In the year 1844 a question as to the validity of this sale was raised in a suspension as of a threatened charge at the instance of the purchaser, and by an action of declarator at the instance of the Respondent, which was conjoined with the suspension. On the 14th February, 1845, the Court of Session pronounced an interlocutor that the deed of entail " contained " no valid or effectual prohibition against selling or alienating " the lands therein contained absolutely and irredeemably, and " that the contracts of sale entered into between the Earl of " Eglinton and the several parties referred to in the summons

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" were and are valid and unchallengeable," and repelling the reasons of suspension, and in the action of declarator finding that " the pursuer, the Earl of Eglinton, has full power to sell " the whole lands in the deeds of entail absolutely and irre- " deemably, and to grant valid dispositions to the several " purchasers."

In the month of May, 1846, while the interlocutor was *sub judice* in an appeal, the Appellant, S. M. Hamilton, the *second* son of the Respondent, was born.

The House of Lords then remitted the case without giving any judgment; and under that remit the Appellant, S. M. Hamilton, was allowed to put in defences to the action of declarator. These defences were afterwards repelled by the Court, and the appeal was taken against this interlocutor and the one previous to the remit.

The Hon. Mr. Wortley, Mr. Hope, and *Mr. Gordon* for the Appellants.—By the first part of the clause of devolution, the Respondent's right to the lands was absolutely forfeited by his " succeeding to a peerage " so soon as that succession opened to him, not by the operation of the clause as a declaration of forfeiture in the technical acceptation of that term, but as a modification impressed upon the destination that it should be enjoyed only by a commoner. Any right, therefore, which the Respondent has is derived from the subsequent part of the clause. By the subsequent branch of the clause the lands are to devolve to the heir having succeeded to a peerage, if there shall have been a failure of all other heirs male of the entailer's daughters, but not so as to do away the forfeiture declared by the previous branch, but only to provide a means by which the lands might be held until another heir not having the ground of forfeiture in him should come into existence.

The right of the Respondent during the temporary title thus given to him was not like that of the heirs under the entail, who

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take *pleno jure* except in so far as limited by the entail itself, for the lands are only to "*remain*" with him "*until*" these other heirs come into existence.

It was not necessary for the entail to void any act which might be done by the Respondent during this temporary right, for the nature of the right was not such as gave him any power to do an act which could bind the lands beyond the period of his possession.

The nature of the limited right thus given to the Respondent, and to those who might be in the same predicament with him, may be anomalous and innominate. It may be difficult to find any class of known rights under which it should be placed, but this difficulty will not alter its essential character as being of a limited nature, and amounting in truth to a trust for the persons entitled to take under the deed upon their coming into existence. In Mackenzie *v.* Mountstewart, *Mor.* 14903 and 14912, although the nearest heir in existence was allowed to serve while a nearer was only *in spe*, yet the right which he acquired by such service was declared to be merely a *fidei commissum* until the nearer heir should appear. And in McKinnon *v.* McKinnon, *Mor.* 6566, it was found that a nearer heir upon his coming into existence had a right from his birth, and that a remoter heir who had taken in the meanwhile until his birth, was bound to denude and convey to him. It is no doubt true that in a subsequent branch of the same case, *Mor.* 5279–5, *Bro. Supp.* 873, 904, it was found that a sale of part of the lands by the heir who enjoyed this temporary possession was good, but the ground upon which that proceeded was that the sale was necessary in order to preserve the estate from being torn to pieces by the creditors of the original disponer, and that in that light it was a prudent act of administration within the powers even of a fiduciary fiar, the necessity and propriety of the sale was the ground mainly put forward and relied upon by the purchaser in his pleading. The expressions used by *Lord*

Kaimes, Mor. 5284, shew that this was the ground relied upon by the Court in making its judgment, and *Bro. Supp.* 905 shows that while only two out of eight Judges were of opinion that the right of the temporary holder was absolute and the sale unchallengeable, four held it to be justified only upon the ground of necessity, and the remaining two were for reducing it as *ultra vires*. In this case, then, upon the authority of *Lord Kaimes*, it was held that the heir taking in the meanwhile "can "be considered in no other light than as a fiduciary heir holding "the estate for behoof of the nearest heir. Upon the principles "of the feudal law he is entitled to the rents for his service "while he acts as vassal, but he is not proprietor in any way "so as to have the power of alienation or contracting debt, for "he is in effect but a trustee, and in that character he is bound "to surrender the estate to the nearer heir," and *Lord Monboddo*, 5 *Bro. Supp.* 849, supports this, where he says that "the "Court was not called on to determine whether the debts of "the fiduciary heir affected the estate, but the President gave it "as his opinion, and with him a great majority of the Lords "seemed to agree, that they would not, because the fee being "of its nature temporary and resolvable, could not be affected "with any."

If, then, the Respondent was in truth but a trustee, it is impossible that he can by a sale defeat the rights of those for whom he is trustee; that he with whom the lands are only directed to "remain" until the birth of his second son should have power while they so remain to defeat by an absolute sale the right of that son before he comes into existence. Whatever might be his character, expectant heir, fiduciary fiar, or trustee, the express terms of the title under which he took were that the lands should remain with him until the birth of the Appellant, his second son.

The Respondent did not take as in the common case of an heir under the entail, subject to a clause of devolution in a

certain event. In such cases the fee is given to the heirs under certain limitations common to them, and subject to a devolution equally extensive. Until the devolution takes effect, they enjoy all the powers of heirs of entail. In the present case the fee was taken from the Respondent on the day that he became a peer, and all right that he could thenceforth pretend was under that part of the clause which provides a mere temporary possession, and which so far from making his right devolve is that which thus gives him any right at all, not as a proper heir in the line called by the investiture, but as a mere hand to hold the estate until the heirs of the investiture come into existence. But,

II. Whatever might be the position of the parties if an actual sale had been accomplished by the Respondent, no such sale has in fact been made; all that has been done is to create a tentative title under which to raise the question of the power to sell; no price has been paid nor conveyance executed; all that the purchaser has is a conditional and personal obligation to convey, if it shall be found that the Respondent has the power. This is at best a conditional obligation to make a sale, but the Respondent was under a prior conditional obligation to convey in favour of the Appellant his second son, on his coming into existence. This was a condition which qualified the Respondent's title, and which, by the Appellant coming into existence, has been purified. The obligation to convey to him has therefore been rendered absolute and defeats the conditional obligation to the proposed purchaser, who entered into his suspensary contract with the full knowledge and in apprehension of the Appellant's right.

III. Assuming that the sale may now be made valid and effectual it was *ex concessis* not completed prior to the birth of the Appellant; it is not yet completed. As the Appellant at his birth was entitled to the land, the price payable for it must belong to him as a *surrogatum*. It may be that the title of the

Respondent was such as will support a sale by him, but inasmuch as the beneficial interest was in the Respondent the price payable must belong to him; Hyslop *v.* Small, 1 *Sh.* 133.

At the conclusion of the address by the Counsel for the Appellants, the Counsel for the Respondents were directed to confine themselves to the question whether the case of their client came within the principle of the decision in M'Kinnon *v.* M'Kinnon, the House not entertaining any difficulty upon the other questions which had been raised.

The Lord Advocate and *Mr. Bethell* for the Respondent.—The clause in the entail upon which this question arises declares in the first branch of it an absolute forfeiture of the lands, in case the heir in possession should succeed to a peerage, not only for himself but for all his descendants, "as long as heirs male "of the bodies of the entailer's daughters should exist." The second branch of the clause assuming the succession to have passed from the heir first entitled by the operation of the first branch directs that the succession shall continue downwards without reverting to the branch thus thrown out, so long as there shall be any heirs male of the bodies of the entailer's daughters; but upon failure of all heirs of the bodies of the entailer's daughters, it provides that the lands should fall and devolve upon the nearest heir male of the body of the excluded heir, and failing all other heirs male of the bodies of the heir, until he or his apparent heir should have a younger son not an apparent heir in the peerage.

The case which in the event has happened, viz., of an heir succeeding to a peerage while there were no other heirs male in existence, was not therefore provided for by the clause. Its provision throughout is for the case of an heir succeeding while there are other heirs male in existence. The first branch excludes him while there are any such other heirs in being, and the second

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winds up by providing for his re-admission on the subsequent failure of such heirs.

But assuming that the clause is broad enough to embrace the case as it occurred, all that it does is to impose upon the heir succeeding to a peerage an obligation to denude in favour of his second son, when he comes into existence. But until that event no limitation is imposed upon this heir other than is contained in the fettering clauses applicable to the heirs generally.

At the time at which the Respondent succeeded under the entail he was a commoner, and there was no other heir male of the bodies of the entailer's daughters then in existence. Unquestionably at this time the Respondent took the lands like any other heir called by the entail, and was entitled to enjoy them as amply.

When the Respondent succeeded to his peerage there was still no other heirs male of the bodies of the entailer's daughters in existence, and as the foreiture upon such event declared by the first branch of the clause in question was to take effect only "as long as any heirs male of the bodies of "my," the entailer's, "daughters shall exist," the forfeiture was still-born, and the clause of devolution never came into operation.

At all events, the soonest period at which, in the most unfavourable view, it could come into operation, was the birth of the Respondent's second son. Up to that time the Respondent's rights under the entail were the same as those of any other heir called by it. The Respondent was liable to have his right brought to an end, not simply by his succeeding to a peerage, but by his having a second son in conjunction with that circumstance. This was a provision not peculiar to him, but common to all the heirs, and one that, until the two events happened so as to bring the devolution into operation, in no degree altered the rights or powers as an heir in possession, which he was entitled to enjoy like the other heirs called by the entail. The

Respondent might never have married, or never have had a son, or he might have had only one son—who in his turn might have succeeded to the lands and the peerage, and have had only one son. The peerage and the lands might have continued thus united for two or three generations, and yet, according to the Appellant's argument, none of the possessors during that time would have possessed as heirs of entail, or under a title to which a *nomen juris* could be assigned; and yet nothing has been shown in the terms of the entail which could prevent them, as in fact the Respondent has done, from exercising the powers given to all heirs of entail by the Aberdeen and Montgomery Acts, to burden the lands for improvements and provisions to wives and younger children, or to do any other act which an heir of entail might do.

The Respondent took the lands in his own right, as the heir called by the deed, and in the order in which he was called—no doubt his title was defeasible upon his having a second son, but till that event happened, and it might never have happened, there was no one who had a prior right, or any title which could interfere with his. His position in this respect was essentially different from that of an expectant heir, to which the Appellant assimilates it. Where lands are given to A. B. on failure of a prior class of heirs or disponees, so long as there is any possibility of any individual of the class being in existence, or coming into existence, nothing is given to A. B. So much is this the case, that until the case of Mountstewart, *Mor.* 14903, an heir in such a situation was not allowed to serve or take possession at all. The lands were put under the care of a curator *ad litem* until the possibility of a nearer heir coming into existence should be beyond a doubt. The case of *Mountstewart*, however, so far relaxed the rule that the expectant heir was allowed to serve and take possession, but under an obligation to denude in favour of the nearer heir upon his coming into existence; and all that the case of M'Kinnon *v.* M'Kinnon

Mor. 6566, did was to affirm the rule that the heir serving was under this obligation.

These cases have no analogy to the present. So soon as the nearer heir comes into existence there is ground for arguing that the possession of the expectant heir has been without a title, as nothing was given to him until the failure of the nearer heir, whose title it may be said draws back to the death of the next heir before him, so as to squeeze out the expectant heir. But the coming into existence of his second son did not make the Respondent's previous possession without a title. As has been already shown, he had as good a title under the entail and in his own right up to that time as any heir called by it, and all that the birth of his son did was to determine that title thenceforth and thenceforth only.

Every act, therefore, done by the Respondent prior to the birth of his second son was good and effectual, unless in so far as it was restrained by the entail; and as the entail has been found not to be effectual to restrain sales, the sale by the Respondent is beyond a challenge.

LORD CHANCELLOR.—My Lords, at the conclusion of the argument for the Appellant, there was only one point which pressed on my mind, and upon which I was desirous of further information from the observations that the Lord Advocate might make, turning entirely upon the nature of the estate which Lord Eglinton took in the property in question prior to the birth of his second son. That arose partly from the apparent similarity to the case of *M'Kinnon*, and partly also from the somewhat complicated provision in the entail upon which the devolution took place. In every other respect, (and I believe that is the opinion of my noble and learned friend,) the case is free from doubt. The point was this:—whether Lord Eglinton is to be considered, after he became a peer, and until the birth of his second son, to have been in possession of the

estate as an heir of entail, and entitled to the same rights and privileges which any other heir of entail would have in such an estate under such an entail, the fetter not being properly imposed as concerns selling or alienating irredeemably. But upon consideration of the terms of the entail, and the observations made upon it, particularly with reference to the facts of the case of M'Kinnon, notwithstanding the doubt which at that time I entertained, I am now perfectly satisfied that Lord Eglinton, there being no other male descendant of a daughter, did not come within the provision of the entail which applied to the case where there were other male descendants, in which case the party having the peerage and the estate, forfeited, not only for himself, but all his male descendants, who were only to come in in the event of the other branches of the male descendants of the daughters failing, but under a provision totally distinct, which provides for the events which have occurred.

Now, that provision is, "And failing all other heirs male of "the bodies of my said daughters, the lands and estate shall then "fall and devolve upon the person possessed of the peerage or "estate entailed as aforesaid, and shall remain with him until he "or his apparent heir shall have a younger son, who is not ap-"parent heir in such peerage or estate, and such younger son or "sons successively shall, on their birth, have right to my said "lands and estate, exclusive of the prior heirs, so that the estate "shall at no time remain with a peer or possessor of lands entailed "under the above condition, while there are any other heirs male "descended of my daughters' bodies, who can take up my estate "and keep up a separate representation of my family."

That provides for the event that has happened, namely, of there being no other male descendant of a daughter at the time of the succession to the peerage, which, although it was not in possession at the time the estate descended, makes no difference, except as to the period when the two united. The estate and the peerage uniting in Lord Eglinton, when the peerage de-

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scended upon him, he had no second son, and there was no heir male of the descendant of a daughter. The event occurred in which it is provided that the peer shall keep the estate until a second son is born, and that on the birth of such second son the estate shall devolve on that second son, the parent, of course, in that case, losing the estate.

The question is, what was the nature of the estate and interest he had until that event happened, and until that event happened nobody could supersede him, that is to say, he had the prior title. A second son being born, there was then a devolution of the estate under the provisions of the entail, but until that event happened, Lord Eglinton was entitled to the estate, and there being no effectual provision against selling, he had a right to contract and sell, and a contract for sale by a party not prohibited from selling, is good against those upon whom the estate may descend.

My Lords, that seems to me to embrace the whole question your Lordships have to decide, and I think that this interlocutor should be affirmed.

LORD BROUGHAM.—My Lords, the only doubt I have felt in this case, has been upon that branch of it which has been alluded to by my noble and learned friend, but which has been removed by further consideration. The first point was disposed of on the last hearing. The second point, whether the contract which was made by Lord Eglinton was such as to embrace the future defeasance of the estate by the birth of the second son, or was only applicable to his rights at the time he made the contract, was disposed of; at least, we felt there was no occasion to call upon the Lord Advocate, who appeared for the Respondent, to offer any argument upon it. We agreed with the majority of the learned judges on that point. Upon the other point, which was ably argued by Mr. Turner the other day, there was no division of the Judges, there was a unanimous opinion of the

Court. We considered that the case of M'Kinnon required to be a little further elucidated, and the more so because the Judges had made no reference to it in their elaborate judgment. That has been satisfactorily explained to-day by the Lord Advocate on the part of the noble Respondent. The only part of the case remaining to be considered, is that to which the Lord Advocate confined his argument, and to which Mr. Gordon, in his reply, was desired to confine himself, and upon that point I agree with the opinion which has been expressed by my noble and learned friend, for the reasons he has given.

GRAHAME, WEEMS, and GRAHAME—RICHARDSON, CONNELL, and LOCH—SPOTTISWOODE and ROBERTSON, Agents.

[*Heard 28th April*, 1846.—*Judgment*, 21*st July*, 1847.]

ALEXANDER GRANT and ROBERT GRANT, Trustees of the Deceased ROBERT LEITH, Esq., of Druminnor, *Appellants.*

JAMES SHEPHERD, W.S., *Respondent.*

Writ.—Where an erasure occurs in a substantial part of a deed, the presumption of law is that it was made after execution; and this presumption is not rebutted by showing that the words erased are consistent with other parts of the deed, for the erasure amounts to a revocation, unless it can be also shown that it was made before execution. Neither can the words written on the erasure be adopted unless upon similar evidence.

Ibid.—Where a vitiation occurs in the first of a series of dependent substitutions, the effect of the nullity of the first is to vitiate the whole.

Homologation.—There cannot be homologation of a deed altogether void by reason of erasures.

Prescription.—Act 1617, cap. 12. The right to sue reduction of a deed, as null in respect of erasures *in substantialibus* apparent *ex facie*, is not cut off by the lapse of forty years.

ON the 13th November, 1761, John Leith executed a deed of entail, whereby, after saying "I have taken into my serious "consideration that I have no heirs male of my own body "to represent me, and that I have grandchildren, and am "desirous that my memory and sirname of Leith should be "preserved in the persons of my grandchildren and their heirs," he disponed his lands to and in favour "of myself in liferent, "and to the heirs male lawfully to be procreated of my own "body in fee; whom failing, *to the eldest son living at the time* "*of my decease*, procreated betwixt John Grant Younger, of "Rothemaise, and Anna Leith, my eldest daughter, and to the "heirs male of his body in fee; whom failing, to the eldest son

" of Thomas Shepherd, minister at Bourty, procreated betwixt " him and Janet Leith, my second daughter, and the heirs male " of his body in fee; whom failing, to the eldest son lawfully to " be procreate of Margaret Leith, my third daughter, and the " heirs male of his body in fee; whom failing, to the second son " procreate betwixt the said John Grant and the said Anne " Leith, my eldest daughter, and the heirs male of his body in " fee; whom failing, to the second son of the said Thomas " Shepherd, procreate betwixt him and Janet Leith, my second " daughter, and the heirs male of his body; whom failing, to the " second son lawfully to be procreated of the body of Margaret " Leith, my third daughter, and the heirs male of his body in " fee; whom failing, to the heirs male of my said first, second, " and third daughter in the same order of succession; all whom " failing, to me, my nearest heirs and assignees whatsomever." And in a subsequent clause the granter declared that " it should " not be in the power of the said John Grant, my grandson, " or any of the heirs of taillie, to sell, alienate, impignorate, " or dispone the lands." The words in the passages quoted, which are in italics, were evidently written upon erasures; at what time made did not appear,

In the year 1763 the granter of the deed executed another deed, whereby he gave the liferent of the lands to his eldest daughter, Mrs. Grant, upon the narrative that the fee had " been " made over to John Grant, her eldest lawful son, by disposition " granted by me in his favour." The entailer died without having had any heirs male of his body. Upon his death Mrs. Grant entered into possession of the entailed lands, and continued in the enjoyment of them until her death in 1807. After her death her son, John Grant, entered to possession, but died without having had any issue, or having made up any title to the lands. Upon John Grant's death in 1790, John Shepherd, the eldest son of the second daughter, entered to possession of the lands, and made up his titles to them as heir of taillie and

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provision to the entailer, and obtained infeftment upon the precept in the deed of entail.

John Shepherd continued in possession until his death in 1832, without issue. But in 1811, during John's possession, his brother Alexander brought an action setting forth that erasures had been made upon the entail, with a view to defeat his rights under it, and concluding to have them ascertained. This action was never prosecuted to a conclusion.

At the period of John Shepherd's death, the third daughter of the entailer had died without leaving issue, and the second and third sons of the eldest daughter were likewise dead; but Janet, the third daughter, was still alive, and it did not appear at what time she died. The lands continued in non-entry until the year 1834, when Alexander Shepherd, the second son of the second daughter served himself heir of taillie and provision, and completed his title by infeftment under the entail.

In 1836 Alexander Shepherd died without issue, and thereupon Robert Grant, who was the fourth, and, at the period of John Shepherd's death, the only surviving son of the eldest daughter, served himself heir of taillie, and was infeft in the lands. At the same time the Respondent, who was the son of the third son of the second daughter of the entailer, sued out a brieve for serving himself nearest heir of taillie and provision. This brieve was the foundation of a competition between the Respondent and Robert Grant, upon the assumption that the deed of entail was valid and effectual, which was ultimately terminated by a decision in favour of Robert Grant, finding him to be the nearest heir under the entail.

After the termination of this competition, the Respondent, in 1838, brought an action of reduction and declarator against Robert Grant and the other heirs of entail, which was afterwards insisted in against the Appellants, who were the disponees of Robert Grant under a fee-simple conveyance in their favour made in derogation of the entail, setting forth that the words

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"the eldest son living at the time of my decease" were written upon an erasure in the dispositive clause, and in the various other parts of the deed in which they occurred, and that there were a great many other erasures in the deed, and therefore concluding for reduction of the deed of entail and the various titles which had been made up under it, and to have it declared that the Respondent, as one of the nearest lawful heirs portioners of the entailer, had a good title to one-half of the lands, and that he ought to be served as heir portioner of the entailer, freed from the fetters of the entail, with other consequential conclusions.

The Respondent, in support of his action pleaded in law—1. That the deed of 1761 ought to be reduced in respect of the vitiations in it. 2. That the erasures must be held to have been made after the date of execution, as they were not mentioned in the testing clause. 3. That he was not barred from insisting in his action in consequence of any of the legal proceedings in which he had been engaged with the Defenders.

Robert Grant pleaded in answer—1. That the Respondent's right to challenge the entail was cut off by the negative prescription. 2. That as the Respondent had homologated and approbated the entail while in the knowledge of the erasures in it, he was barred from challenging the deed *personali exceptione.* 3. That the erasures did not occur in essential parts of the entail, and therefore it was valid and effectual. 4. That it was competent to show by parole testimony that the erasures had been made and words superinduced upon them before the deed was executed. 5. That as the Respondent's ancestors had made up titles under the entail to the exclusion of the other heirs-portioners, and had thereby incurred an implied obligation to abide by the entail and waive their right of challenge, the Respondent could not pass by the heirs between himself and the entailer, who had made up titles under the entail, and serve to the entailer, without becoming liable to the obligation so

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incurred by the intermediate heirs, and was, therefore, barred from challenging the entail. 6. That as the intermediate heirs had adopted the entail by serving under it, and had thereby renounced their right of challenging it as heirs-portioners, and as these intermediate investitures contained a destination in favour of the Defender, all right of challenge by the Respondent was cut off.

The Lord Ordinary, (*Cunningham,*) before taking the case to report to the Inner House, issued the following note:—

"I. It is set forth by the pursuer that the instrument under "challenge, in so far as it refers to the first disponee in the tailzie "after heirs of the granter's own body, is uniformly and in every "instance *erased*, and the first question which arises is, If this "be an erasure *in essentialibus?* As to that point the Lord "Ordinary has no doubt. It is self-evident that the name or "legal designation of the party called in a leading place of the "destination, is one of the most essential parts of a conveyance, "and, therefore, if the deed under reduction had been a convey-"ance to that party alone, whose right is constituted only by "words written uniformly on erasures, it must have been in-"stantly reduced as void and improbative. The analogous case "of Keddar, decided in this Court in 1835, (*vide* Reports of 6th "March, 1835,) and affirmed with costs in the House of Lords "within these few weeks, would be decisive of the question. In "one respect the erasures in the case of Keddar could hardly "be viewed as so essentially affecting the deed as those which "occur here; for in Keddar's case the testing clause was so "framed as to entitle the defender very plausibly to argue that "the word erased had been altered by consent of the granter; "but there is no such speciality in the present case.

"The defender refers to another deed executed by John "Leith on 31st August, 1763, to show that the disposition and "deed of tailzie, exactly as it stands, though erased, was "thereby acknowledged to have been previously executed by

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" him. But that deed, in the Lord Ordinary's mind, leads to " an opposite conclusion. It is therein set forth that the dis- " position and settlement of Blair, sometime before executed " by Mr. Leith, was in favour of his grandson, *'John Grant,'* in " fee. It is probable indeed that the conveyance under reduc- " tion was so framed in the first instance, and that the words " 'John Grant, eldest lawful son procreate,' &c., stood at first " upon the space erased, and which now bears these words, " 'the eldest son living at the time of my decease, procreate " 'betwixt John Grant,' &c. &c. The difference between these " modes of designating the first member of the tailzie might " unquestionably have been of great importance, as in the one " case a favoured *individual* was called, who might have pre- " deceased the granter, while on the other, such party as might " be his eldest daughter's eldest son, *at the time of his death*, " was called. As John Leith, however, in the deed of 1763 " referred to the conveyance as one then subsisting in favour of " his grandson, John Grant, by *name*, it rather goes to shew " that the deed was altered and erased after that date. That " state of the fact could obviously confirm very strongly the " pursuer's plea.

" Reference, however, is farther made by the defender to " the parole testimony of Alexander Scott, the writer of the " tailzie under reduction, and one of the testamentary witnesses " who it is said emitted a disposition taken to lie *in retentis* in " another process in 1814, in which he swore that the erasures " founded on were made before the execution of the deed, and " at the *express desire of the granter*. But as a similar proof " was offered in Keddar's case, and refused, and as the judg- " ment of the Court on that point, as well as on the merits of " the case, has been lately affirmed in the Court of last resort, " the testimony of Scott must be thrown entirely out of view in " the present question.

" Had the deed under challenge then been a conveyance

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" to that party alone, whose name and legal designation is " written uniformly on erasures, the deed must have shared the " fate of that of Keddar's case, and been reduced.

" II. It is next maintained on the part of the defender, " however, that there is a material and decisive distinction " between the present case and that of Keddar, in so far as it " is alleged that the party entitled to claim under the erased " clause of the taillie, according to any reading which the clause " (as completed by words written from the first in characters " clear and unvitiated) admits of, and his whole issue are long " since extinct, and that the defender's claim arises under " *other* clauses inserted and constantly repeated in the tailzie " without any erasure, and therefore it is argued that the con- " veyance to the defender, at all events, must stand good and " receive effect, on the maxim that *utile per inutile non vitiatur.* " The argument and authorities on that view of the case are " pretty fully detailed in the revised case for the defender (pages " 14, 22), although the pursuer has not thought it necessary to " advert to them. The pursuer appears to have taken it too " easily for granted that this part of the defender's case required " no notice.

" No doubt there is a distinction between the present case " and many of those in which a deed has been held in part " ineffectual and sustained *quoad ultra* as improbative. Thus, " when a settlement, conveying heritage and moveables, is " found ineffectual as to the former, there is no difficulty or " inconsistency in giving effect to it as to moveables, because it " must be presumed to be the will of the deceased to give the " party favoured the benefit of the conveyance, as far as it can " be enforced, according to law; and, on the same principle, " though one clause of a settlement conferring a legacy on an " individual (as in Kemp's case) is vitiated or rendered impro- " bative, the instrument may be sustained as to another bequest, " when there is no vitiation in the clause relative thereto. But

" it is doubted if these cases are sufficient to rule decisively " such a question as the present, in which there are erasures " throughout the whole of the conveyance in the description of " one of the primary members of the dispositive or destination " clause. It may be argued that the ulterior members of the " destination are only introduced on his failure, and that the " substitutes can never take if there be any uncertainty or " nullity in the nomination of the party, on the contingency of " whose failure only any right is given to them.

"This is a point which seems to have been much considered " by the Court in the case of Abernethie *v.* Forbes in 1835, " (*vide* Reports, 16th January, 1835;) and then it was found to " be an irrelevant objection to a tailzie, as an obligatory deed, " to allege that the nomination of a *posterior* substitute in such " a deed was null and ineffectual, from the mode in which his " name was filled in. Still it was noticed, as a specialty of " importance in that instance, that the nomination objected to " was that of a *posterior* and not of a prior substitute. Whether " the erasure, or as it might be, the omission to fill up an " earlier disponee's name in proper form, should vacate that " of other disponees, clearly and correctly named and designed " in the deed, seems at least an open question, not decided *in* " *terminis* in any prior case; and if the present question shall " be thought to bear on that point, it may deserve more dis- " cussion than it has yet received in the argument hitherto " urged in this cause.

"III. There are other views of this case, however, which " deserve to be considered before the parties are involved in " much expense in the preceding question.

" In particular, the defender pleads, that all challenge by " the pursuer of the tailzie is excluded by the *negative pre-* " *scription*, which it is said cuts off the pursuer's right to " challenge the deed, even although the defender and his " predecessors have not had possession exclusively under it for

" the full period of forty years. The Lord Ordinary must own " that he should doubt the soundness of that plea, as applied " in the abstract, or in ordinary cases to dispositions, which the " Act 1617 expressly requires to be fortified by *possession*, " bruiked under the rights protected by that law. Neither " does the case of Paul in 1814 (*Fac. Coll.* 8th February, 1814) " support the argument of the defender, as that proceeded on " decrees of adjudication and expiry of the legal, followed " by seventy or eighty years' possession, (though not by a " regular feudal title,) which plainly distinguished that case " from the present in one essential particular, it being main- " tained here that, in one view, actual possession under the " entail did not commence till 1807. If the Court, however, " shall think that the possession of the heirs of tailzie com- " menced in 1790, by the infeftment taken by the defender's " uncle, John Shepherd, in that year, to be immediately " adverted to, then this challenge will be excluded, and the title " of the heirs of entail will be for ever validated by the *positive* " prescription.

" As this does not seem to be the view of the case on which " the defender relies, the Lord Ordinary thinks himself bound " to state that, on a careful examination of the circumstances of " the present case, and of the titles and other writs produced, " various pleas arise against the challenge now brought forward, " which, though not pleaded on record, will probably occur " before the case is finally disposed of, and therefore deserve " very serious consideration. It will be observed then that " the pursuer sues this action as now one of the two *heirs-* " *portioners* of John Leith, the maker of the tailzie. John " Leith died in the end of 1763; and, although the property " libelled on was disponed by a separate deed to a liferenter " who survived till 1807, yet the fee of the estate was " claimable by the heirs at law, from the period of John " Leith's death downwards, if they chose to challenge the

" tailzie as erased or improbative, or on any other ground. " Leith, as appears from the tailzie, had no sons, but he left " three daughters, one of whom died unmarried, so that the " two heirs-portioners were (1.) the heir of Mrs. Grant, and (2.) " the heir of Mrs. Shepherd. But the parties who possessed " these characters for a long series of years after Mr. Leith's " death, did not choose to claim as heirs-portioners, but found " it more for their interest, or chose on views of their own, to " homologate and give effect to the tailzie. In particular, when " Mrs. Grant's eldest son died prior to 1790, the defender's " elder uncle, *John* Shepherd, made up a title under the tailzie. " by getting himself retoured as heir of entail, and taking " infeftment on the precept of sasine thus taken up in 1790. " Upon that title John Shepherd drew the rents of the whole " estate of Blair from the death of the liferenter in 1807 till " his death in 1832, a period of 25 years. Again, on John's " death, his next brother, Alexander Shepherd, also served heir " *under the tailzie*, and made up titles and continued in pos- " session of the estate for four years, till his death in 1836.

" Now it is supposed that both of these parties did, from " the date of the titles expede by them, or at least long prior to " their deaths, *unite* in their persons the characters both of " heirs-portioners and of heirs of tailzie of John Leith. The " retour of Alexander Shepherd in 1834 (No. 54 of process) " expressly bears, that his mother was *then* deceased, and it is " possible she may have predeceased John also. If so, both " the Messrs. Shepherds, while heirs-portioners, made their " election and expede titles under the tailzie which the other " heir-portioner of old Mr. Leith admitted. One question, " then, which arises here is, If any subsequent heir claiming " this estate, or a portion of it, as an unlimited fee, can challenge " the title which his predecessors chose to adopt and confirm. " It appears very difficult to maintain such a plea. Not only " were the Messrs. Shepherds entitled to take up the estate " under the tailzie if they chose, in preference to claiming on

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" their fee-simple title, but their doing so was a most natural " and beneficial proceeding for them, though it was equivalent " to a discharge of all action competent to them and their succes- " sors, as to the validity of the deed of tailzie as a probative " and authentic writ. Suppose that either of the Messrs. Shep- " herds deceased had been the sole heir of line of old Leith, and " that the entail had been executed by him on deathbed, if they " chose to decline instituting a challenge on that head, and to " make up a title under the tailzie, and to possess thereon for a " series of years, could their son or any collateral heir *pass by* " their immediate predecessor, and serve to the tailzier in the " character of an unlimited fiar, and prosecute the challenge " which the primary heir had waived and virtually discharged? " The contrary has been repeatedly found, as exemplified in the " case of Hood 1734, reported by *Elchies, voce* deathbed, and " in that of Hedderwick in 1740,—*Dictionary*, page 3180.

" But the present is a far stronger case. Here the heirs-por- " tioners, who were called as heirs of entail, and ultimately took " up the possession as such, were *lucrati* to a great amount by " confirming the entail; they got the whole rents instead of one- " half only, to which they must have been limited as heirs-por- " tioners. Hence the question arises, If they did not come under " an onerous obligation, binding on themselves and their succes- " sors, not to impugn, but to give effect to the tailzie, at least as " the authentic deed of their common author? It is important " under this head to observe, that the documents produced, and " in particular the proceedings in the former process at the " instance of Alexander Shepherd in 1814, already referred to, " (*vide* Nos. 25—53 of process,) prove that that party was *quite* " *aware* of the whole erasures now founded on. Nevertheless, " he abandoned all claim as heir of line or heir-portioner of his " grandfather, and made up a title under the tailzie. It is to be " considered if any heir of line after him can challenge a title " which he ratified.

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"The pursuer's plea, of course, must be, that he does not re-
"present either of his uncles, John or Alexander Shepherd, and
"that the title he has expede is as one of the heirs-portioners of
"his great-grandfather, Mr. Leith, *passing by* the parties who
"first succeeded and acknowledged the tailzie. But the ques-
"tion is, If he be entitled to pass by preceding heirs, who were
"entitled, (on the pursuer's view,) to take up the share now
"claimed in fee simple? As the Messrs. Shepherd could have
"sold or burdened the one-half of the estate if they chose, it
"seems to follow that they could forego and discharge the right
"to challenge any settlement of it, competent to them as ordi-
"nary heirs, and more especially when they got a large benefit
"by so doing, and had possession of the estate for many years.
"It is rather thought that every heir attempting to pass them
"by, is bound, both according to the intent and terms of the
"Act 1695, to fulfil their acts and deeds. The estate of old
"Leith, if the entail was challengeable, may be viewed as con-
"sisting of *two* portions, viz. the portion claimable by the
"Grants, and that claimable by the Shepherds. But when
"John and Alexander Shepherd, being successive heirs-por-
"tioners, took up the whole entailed estate, they came under
"an obligation to execute an entail of their own portion, if the
"title were in any respect objectionable. This was one of the
"chief points decided in the case of Carmichael in 1810, (*Coll.
"Fac.* 15th November, 1810,) which has an important bearing
"on the present case.

"At the same time, the Lord Ordinary is bound to feel
"some distrust as to the views thrown out in the latter branch
"of these notes, as they have not hitherto been urged by the
"parties, and have probably been rejected on grounds which
"will be apparent on a more mature consideration of the case.
"It may also be doubted if the record, as prepared, would
"admit of the whole pleas latterly suggested. Hence it is re-
"commended, that the parties should confer with each other on

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"the shape of the record, and of the cases as prepared, and "consider if they should not be amended. The case may be "enrolled in the first motion roll of November, and if the parties "think the cause then prepared for report, an order to that "effect will be pronounced." In consequence of the suggestion in the concluding part of this note, the two last pleas which have been stated for the Appellants were put upon the Record.

On the cause being reported, the Inner House directed the papers to be laid before the whole Judges of the Court for their opinion, and thereafter, (on the 19th January, 1844,) in conformity with the opinion of the majority of the consulted Judges, sustained the reasons of reduction, and decerned in terms of the declaratory conclusions.

This interlocutor was the subject of appeal.

The *Lord Advocate* and *Mr. Bethell* for the Appellants.—The destination in the deed is quite in consistence with the intention of the granter, as expressed in the inductive clause. His wish is to have his name and memory preserved in his grandchildren, and his first disponee is a son of his eldest daughter—that is beyond dispute from the words which are unerased; and that this son was the eldest is shown from the subsequent part of the destination, where, after giving the lands to the eldest son of the second and third daughters, it reverts to the second son of the eldest daughter.

[*Lord Chancellor.*—The words originally might have been to the third son.]

But John Grant is mentioned in a subsequent part of the deed, where he is prohibited by name from selling or alienating, and the general structure of the deed raises probabilities against any other person amounting almost to a certainty.

If when the competition arises no person is in existence to claim under the first substitution, its being upon an erasure won't destroy the deed. The erasure amounts to no more than this,

that it leaves it uncertain which of the sons of John were to take first; but all of the sons being gone, the deed remains good as to the other substitutions. If there be a gift to the eldest son of the marriage of A and then in remainder, though the words of the first gift be upon an erasure, yet if *all* of the class who could possibly claim under it are extinct, there is neither reason nor authority for saying that the erasure in the first gift will render that in remainder void; the two are separate and distinct parts of the deed.

[*Lord Chancellor.*—If John Grant could not take under the deed, the subsequent estates could never arise. Till the first estate is known, the remainders cannot come into existence.]

But the erasure does not necessarily prevent his taking, if from the other parts of the deed it be apparent that in the erased part he was the person intended; and this is shown by the mention of his name in several subsequent parts of the deed where it is not written upon an erasure. The erasure to be fatal must be in an essential part of the deed, and what is essential is not determined by looking at the particular part, but by looking at it in connexion with the rest, *Stair*, IV., 42, 19, Wright *v.* M'Leod, *Mor.* 11540; Lyon *v.* Aboyne, *Mor.* 11544.

II. The Respondent's right is barred by the acts of those under whom he claims. When John Shepherd, on the death of Mrs. Grant, made up titles to the lands, he could only have done so on an agreement to hold the deed of 1761 as valid; for on the hypothesis of its being invalid his mother, as heir-portioner of the granter, was entitled to one-half of the lands, and all to which he would have been entitled would have been to that half from her death, but, passing by her, he made up his title to the whole under the deed of 1761, and so did his brother Alexander upon his death, and both of them until their respective deaths possessed the entire lands under these titles, to the exclusion of the children of the first daughter, who, on the hypothesis of the deed being invalid, were entitled to have en-

joyed one-half of them. This in fact amounts to a transaction between the parties—to an agreement to hold the deed valid upon the footing of being allowed to enjoy the rights which it gives according to its terms. To allow the Respondent to challenge the deed after those through whom he claims have reaped the benefit of this agreement, would be to sanction a fraud upon the other parties to it, and to deprive them of the consideration for which they yielded the possession of the whole lands, and forbore to assert their legal right to two-thirds, viz., the prospect of at one time enjoying the whole themselves. But the Respondent is excluded from this course, not only upon equitable but upon legal grounds. If the deed of 1761 was a nullity, John and Alexander Shepherd had a right only to a third, and that upon apparency; their possession of the other two-thirds was upon an agreement to hold the deed valid as to the whole, and that is such an agreement as falls under the Act 1695, and as the Respondent is bound to fulfil, seeing both of the Shepherds were more than three years in possession, Carmichael *v.* Carmichael, 16 *F. C.* 17.

III. The acts of John and Alexander Shepherd amount to a ratification of the deed of 1761; to making valid that which otherwise might have been invalid, and such a ratification is binding, not only upon the party who makes it, but upon every remoter heir, whether such remoter heir takes under the party homologating or not. *Ersk.* III., 8, 99. Moreover, the Respondent is barred by his own acts from challenging the entail, for in the competition of brieves he joined issue with the Appellants upon their rights under it, as a valid and subsisting deed, while aware of the defects upon which he now challenges it.

IV. The Respondent's right of action is cut off by the negative prescription, and this is a plea which the Appellants are entitled to maintain, although they might not have established in themselves a title by the positive prescription. It is no

doubt true, that when there is a competition of rights, no party can plead the negative prescription who has not established in himself a title by the positive; but it is not so where the negative prescription is pleaded in defence to an action challenging a deed upon nullities in it. When the question is not as to the right of ownership of lands, but a challenge of a deed dependent upon various extrinsic enquiries, the right to prosecute such enquiries prescribes by the statute 1617, cap. 12, like any other action, Paul *v.* Reid, 17 *F. C.* 556.

The Solicitor-General and *Mr. H. Robertson* for the Respondents.—It is unnecessary to produce any argument or authority to shew that the erasure in the first branch of the destination is a vitiation *in substantialibus;* and any attempt to shew from other parts of the deed that the words on the erasure correspond with them, does not get over the objection of there being no evidence that the erasure was made by the maker of the deed. If the nullity could have been maintained successfully against the sons of the eldest daughter immediately after the entailer's death, it is impossible that any posterior change of circumstances could alter the rights of the parties. If an action of the nature of the present had been then brought by the younger daughters of the entailer, as his heirs-portioners, together with the elder daughter, it must certainly have prevailed, and had the pursuer obtained decree, reducing the entail, and declaring their rights as heirs-at-law, by what possibility could any party entitled to take under the subsequent branches of the destination have disturbed that decree at any future time? How could he have established the failure of the first branch of the destination, which must have been a condition precedent to his own right to take, while that branch was a nullity, and so declared? how could he have established his right to take under a destination commencing with "Whom failing," when he could not shew who was the first dis-

ponee whose failure was to give him his right. If this be so, it cannot make any difference that the action was not brought until a later period, so long as it is not barred upon other grounds. Any offer to set up by parole the erased clause, so as to shew the failure of the parties entitled to take under it, would at every period have been ineffectual, Kedder *v.* Reid, 1 *Rob.* 210.

II. If there was any agreement express or implied, with John or Alexander Shepherd, it was in favour of the heirs under the entail, and the object of it was to support it as a valid and effectual deed; but the Respondent does not claim as an heir under the entail; he claims as heir-at-law, and against the entail as a nullity. Assuming, therefore, that there had been an agreement of the nature pretended, the Respondent is not under any obligation to perform it either legal or equitable. If John and Alexander Shepherd possessed at the expense of any one, it was at the expense of the heirs-at-law, who were thereby excluded, and if any one was to gain by the agreement, it was the heirs of entail, who were thereby to acquire a *spes successionis*. Neither, assuming such an agreement to have been made, are the Appellants in a situation to insist on its performance: for neither do they claim under the entail, but under a disposition from Robert Grant, the original Defender, made in derogation of the entail.

And with regard to the Act 1695, the Respondent does not represent either John or Alexander, but claims through his father and his grandmother, the daughter of the maker of the deed; neither did John or Alexander ever possess the lands in apparency. When John made up his title in 1790, both his mother and the eldest daughter of the entailer, his heirs-at-law, were alive, and his mother was still alive in 1807, when he actually entered to possession, on the death of Mrs. Grant, the liferentrix, and he made such entry under the title of his service as heir of entail. With regard to Alexander Shepherd he also

made up titles under the entail; and whether he possessed under this title or in apparency, his possession did not extend to the period required by the statute, for it commenced in 1834, and he died in 1836. The Act 1695, therefore, has plainly no application to this case.

III. If the deed be a nullity, as the Respondent maintains it is, there can be no room for the plea of homologation; it is impossible, by homologation, to make a deed where none exists. But no act of that nature has been done by the Respondent sufficient to bar his challenge, and he does not as to this either represent John or Alexander Shepherd so as to be bound by anything they may have done.

IV. Though the right to challenge deeds upon extrinsic nullities is cut off by the lapse of forty years, so that a deed *ex facie* good becomes so by the lapse of that period, it is not so where the objection is intrinsic, and apparent on the face of the deed. In such case no lapse of time will validate the deed, or cut off the right to challenge it, *Ersk.* iii. 7, 9. It does not make a difference that the objection cannot be made by way of exception, but requires to be made good by action of reduction, for in the case of Ainslie referred to by *Erskine*, the objection was taken by action of reduction. But if the negative prescription were applicable, there are no *termini* for its application to the present case. Till 1807, when the possession of the liferentrix ceased, it did not appear whether the entail would be founded upon as a title of possession, and no one had any interest to challenge it till then, and between 1807 and the date of this action forty years had not elapsed.

LORD LYNDHURST.—My Lords, This case arises out of a disposition made by John Leith in the year 1761, whereby he disponed and conveyed his estate of Blair to and in favour of himself in liferent, and the heirs male of his body in fee, whom failing, to the eldest son living at the time of his, (the grantor's,)

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decease procreate between John Grant the younger, of Rothmaise, and Anna Leith, the grantor's eldest daughter, and to the heirs male of his body in fee, whom failing, to the eldest son of Thomas Shepherd and Janet Leith, the grantor's second daughter, and the heirs male of his body in fee, whom failing, to the eldest son of the grantor's third daughter Margaret Leith, and the heirs male of his body in fee, with substitutions upon failure of the persons to take under the previous limitations in favour of the second sons successively of the three daughters in tail male, and afterwards to the heirs male of the daughters in the same order of succession, with ultimate remainder to the grantor's nearest heirs and assigns whatsoever.

The words "The eldest son living at the time of my "decease," are written on an erasure, and wherever they appear in the deed, which occurs several times, they are in like manner written on erasures.

Now if the part of the deed in which the vitiation occurs is a material part, or, according to the Scottish phrase, if the vitiation is *in substantialibus*, the deed becomes improbative, and no evidence can be received for the purpose of proving when or by whom, or under what circumstances the alterations were made. Here the erasure is in the dispositive clause, in the name and designation of the person who, on failure of heirs male of the body of the grantor, was to take the estate. It is impossible to contend that this is not an essential part of the deed, or that the vitiation is not *in substantialibus*. And indeed this seems scarcely to have been disputed.

The deed therefore being clearly improbative, no evidence can be admitted to prove when or by whom the alterations were made, and there is nothing on the face of the deed itself to shew that the alterations were made before the execution. The presumption of law therefore is that they were made afterwards (*Ersk.* iii. 2, 20). But it is unnecessary to carry the case so

far. It is sufficient that the erasures may have been made after the execution of the instrument, and that they may have been made by the grantor; and if so, as he had clearly the power to revoke any of the dispositions contained in the deed, and as it is obvious that the erasures were intentionally and deliberately made, this would constitute such a revocation.

Even admitting, then, that it were possible from the rest of the instrument to ascertain with absolute certainty, (which I I think it is not,) what were the words erased, they could not be restored, because that would be to determine, without anything to warrant it, that they had not been erased after the execution, and by the grantor, or by his authority, and with the deliberate intention of revoking the disposition.

But if the words erased cannot be restored, the remaining question will be whether those which are written on the erasure can be substituted in lieu of them. It is clear they cannot, for there is nothing to shew that they were inserted before the execution, and no evidence can be admitted for the purpose of establishing that essential fact. They are wholly unauthenticated. It follows, therefore, that this part of the deed is entirely inoperative.

How then does this affect the rest of the instrument? There is no doubt that a deed may be good in part, and bad in part. Where there are two independent provisions, the one may be vitiated by erasure, and the other may prevail, as in the case of a deed giving a legacy to A, and another to B. If the legacy to A be vitiated by erasure, yet the legacy to B may remain good. So also where there is a grant of an estate with a series of substitutions, and one of the later substitutions fails by reason of an erasure, that would not affect the previous estates. This was decided in the Balbeithan case, and as it would seem on the ground of those estates not being dependent on the subsequent defective limitation. But here the subsequent estates are to take effect after the failure of heirs male of

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the body of an uncertain person whom the testator has not designated, there being no admissible evidence to prove who was the person intended. The vitiation, therefore, of the first limitation equally affects the substitutions which follow, and which are dependent upon it. This is the view which I submit for the consideration of your Lordships upon the first and more important part of the case under appeal.

Considerable reliance seems to have been placed in the Court below upon the ratification of the supposed disposition by John and Alexander Shepherd, with the acquiescence of all parties who had an interest in the matter, and even by James Shepherd himself, who instituted proceedings in the Court of Session founded upon the deed of 1761. But if there was in truth no disposition, no conveyance, (for this is the effect of the vitiation of the deed,) it is not easy to understand how there could be a ratification of it. To give effect to this supposed ratification would, in fact, be not to ratify but to make a disposition for the grantor, a disposition which he himself had not made.

Then as to the act of 1695, it appears to me to have no application to the present case. John and Alexander Shepherd, (the latter without right,) possessed the estate and made up titles, not as heirs-portioners but under the supposed disposition of 1761. The present claimant contests that disposition, and claims the estate under a different title, viz., as heir-portioner of his great-grandfather John Leith. The apparency therefore is in respect of a different title from that under which he claims. Other objections are stated to this defence in the opinion of Lord Wood, one of the consulted Judges, and to which I think no satisfactory answer has been given.

The only remaining point for consideration is the negative prescription relied upon by the Appellant. Now even admitting that possession under the deed of 1761 is to be calculated from 1790, the date of the investiture, and notwithstanding the

existence of the life estate which did not expire till 1807, such possession being founded upon a deed vitiated by erasure *in substantialibus* and *ex facie* void, will not, I think, upon the true construction of the statute of 1617 be sufficient to support the positive prescription, and if the positive prescription could not in this case be maintained the negative prescription must also fail.

As to the argument that this being an action to reduce the deed of 1761, the right being a mere right of action, is lost by the single effect of the negative prescription, the answer is that the deed being vitiated by erasure *in substantialibus*, and in that respect a nullity on the face of it, the rule does not apply, and that in a suit brought, as in this case, to recover the property, such an obstruction to the title may be removed notwithstanding the provision of the statute to which the Appellant refers.

I move your Lordships, therefore, that the judgment be affirmed.

LORD CAMPBELL.—My Lords, I entirely concur in the opinion expressed by my noble and learned friend, who has so very clearly and satisfactorily stated his reasons for that opinion, that I think it quite unnecessary to add a single word to what he has said.

LORD LYNDHURST.—I beg to state to your Lordships that the noble and learned Lord who has left the House, (Lord Brougham,) also agrees in the opinion which has been expressed.

RICHARDSON, CONNELL, and LOCH—SPOTTISWOODE and ROBERTSON, Agents.

These Cases, which conclude those of last Session, have been kept back till now in hopes that they might have been added to; but as there is no prospect of this for some time, they are given to the profession, although the part is incomplete. The volume, when complete, will include the Cases of this Session.

December 11, 1847. S. S. B.

[HEARD 11*th*—JUDGMENT 17*th February*, 1848.]

WILLIAM FLEMING, Manager of the Clydesdale Bank, Edinburgh, and Others, *Appellants.*

WILLIAM HOOD NEWTON, No. 54, New Buildings, North Bridge, Edinburgh, *Respondent.*

Libel.—Records.—As all the records are by statute made open to the public, it is not libellous for a body of merchants to publish to each other the names appearing upon the Register of Protests, of persons who have dishonoured their bills.

Ibid.—Ibid.—The decrees of the Courts upon the registration of deeds and protests are equally open to the public, and may be published to it, as decrees pronounced *in foro contentioso.*

Ibid.—Jurisdiction.—Interdict.—Whether the Courts have any power to interdict *a priori* the publication of matter alleged to be libellous. *Quære?*

Ibid.—Interdict.—A party cannot ask interdict to restrain the publication of matter which, by the application for interdict, he himself makes more public than the publication complained of could have done. *Semble.*

IN the year 1837, certain individuals, amounting in number, at the date of the application about to be mentioned, to 320, formed themselves into a society, to be governed by a committee of twelve directors and a secretary, having for its object the communication to its members of information in regard to the mercantile solvency of persons not connected with the society; and the following regulations, among others, were adopted for the accomplishment of this object:—

"III. The secretary shall collect from the General Records "of Protests, Hornings, and other records of diligences, kept "for Scotland at Edinburgh, the names and designations of "debtors in trade and otherwise, appearing in these records.

"The Secretary shall likewise excerpt from the 'Edinburgh "Gazette,' the names and descriptions of sequestrated bank- "rupts, and all notices of applications for *cessio bonorum*. The "whole information thus collected, will be so classed in alpha- "betical order, as to render the whole clear and comprehensive "and easy of reference; and the lists of debtors so arranged, "shall be printed and forwarded monthly, or oftener, as the "General Committee of Directors shall think proper, to each "member of the Society respectively.

"IV. So soon as the Society's funds will admit of it, the "General Committee shall appoint District Secretaries or Sub- "committees in each county town of importance in Scotland, "for the purpose of collecting, in manner before recited, the "names and designations of debtors whose names shall appear "in the County Records of Protests and Hornings, and against "whom decrees may be allowed to pass in absence, as contained "in the minute-book kept in each Sheriff-court. The informa- "tion so collected shall be transmitted monthly, or oftener, as "the General Committee may direct, to the Secretary of the "Society at Edinburgh, and included by him in the printed "lists to be circulated amongst the members respectively, in "manner before mentioned.

"V. The information contained in the printed records so "forwarded to members, shall be confined to themselves for "business purposes; and no member shall communicate or use "such information for other purposes, under the penalty of "deprivation of membership.

"VI. With reference to the information contained in those "printed records, every member shall be perfectly free and "unrestrained in his engagements, and left to the full use of his "own discretion and pleasure, in giving or refusing credit to any "individual.

"VII. In order to remedy the inconvenience so much felt "from the want of a regular source of information regarding

"the amount of dividends on bankrupt and insolvent estates, "and the dates of payment, it is hereby provided, that on "receipt of positive intelligence of the failure of any house or "person, who may be indebted at the time to any member or "members of this Association, it shall be the bounden duty of "each member receiving such intelligence, to communicate the "particulars and amount of their claim to the Secretary of this "Association immediately.

"X. Wholesale merchants, manufacturers, bankers, under-"writers, insurance companies against risk by sea, fire and life "assurance societies, wherever resident, and none others, except "the Secretary of the Society for the time being, shall be "eligible as members of the Association; and it is hereby "declared, that in case any persons shall become members under "an erroneous designation, or shall become members of a pro-"fession inconsistent with this rule, it shall be competent to the "Committee to expel them; and in particular, no licensed "attorney shall be eligible as a member of the Society, under "the exception before expressed.

"IX. Monthly meetings of the General Committee shall be "held for the purpose of transacting the ordinary business of the "Society, if occasion requires, and for the purpose of admitting "new members; and it is hereby declared, that no person shall "be admitted without the approbation of two-thirds of the "members of Committee present, such approbation to be ascer-"tained by the vote of the Committee."

This society, of which the Appellants were the committee of managers, had for some time printed and distributed among its members every week the information which it had obtained from the public records, in the manner pointed out by its regulations.

In the month of November, 1845, the Society was about to publish its ordinary weekly intelligence, in which would have been inserted the name of the Respondent, as the maker of two promissory notes, which had been protested for non-payment.

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But the publication was stopped by an application to the Court of Session, on behalf of the Respondent, setting forth, "that "the Respondents," *i.e.*, the present Appellants, "know "nothing, and have no concern with the promissory notes, "after mentioned, viz., a promissory note, of date the 21st "day of March last, granted by the complainer to Andrew "Millar, flax-dresser in Kirkaldy, for 48*l.* 13*s.* 4*d.*; 2nd, a pro- "missory note, of date 18th February last, granted by the com- "plainer to the said Andrew Millar, for 100*l.*, and both of "which notes are, and have been indorsed by the said Andrew "Millar to the Union Bank of Scotland, and having fallen due, "were protested for non-payment, and the protests recorded by "James Andrew Anderson, Esq., manager thereof. The com- "plainer has good grounds for declining to pay the said promis- "sory notes," and praying for an interdict to prohibit them "from publishing or printing the name" of the Respondent "in a list or publication entitled 'The Scottish Mercantile "'Society's Record,' or from inserting his name therein as "a party connected with the said promissory notes, or from "otherwise interfering with the complainer's name in any "way."

The Appellants answered that there had not been any circulation of the Society's lists beyond its own members, and that, with the view of confining it to them, a notice was prefixed to each number, in these terms, "For the exclusive use of mem- "bers. Any member exhibiting or communicating the con- "tents of his list to persons unconnected with the Society will "forfeit his right of membership;" and they admitted, that in the number, which was about to be published at the time the application for interdict was presented, the name of the Respondent would have appeared in the manner anticipated by him.

The Lord Ordinary granted interim interdict, and after the preliminary papers were printed, reported the case to the Court,

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upon the following note, which discloses the grounds upon which the application of the Respondent was rested.

"The Lord Ordinary considers this a case of great import-
"ance, and calling for the authoritative determination of the
"Court, with as little delay as possible The Respondents
"describe themselves as members of a society, for whose use
"there is prepared, printed, and circulated among themselves, a
"weekly paper, called 'The Scottish Mercantile Society's Re-
"'cord.' This paper contains a list, taken from the General
"Register of Protests kept at Edinburgh, of the names and
"designations of all parties against whom protests have been
"recorded, and also from the record of Hornings and other
"diligences, as well as of all sequestrated bankrupts and other
"applicants for *cessio bonorum*. It further embraces the names
"of those appearing in similar county records, or against whom
"decrees in absence have passed, as well as a note of suspension
"of charges, taken from the books of the Bill-Chamber. The
"information thus procured is arranged in alphabetical order,
"for the sake of easy reference. There is no limitation as to
"the number of the members of this society, as it is called. It
"was admitted that there are at present several hundreds, con-
"sisting chiefly of bankers and mercantile men; and it was
"contended, that there was no law to prevent the circulation of
"such a list among 1000, or 20,000, or any number of persons
"who might think fit to join. But it was said, that this does
"not amount to publication, the information being confined to
"the members for business purposes, and the penalty for com-
"municating to others the information thus obtained, or using
"it for other purposes, being a forfeiture of the right of mem-
"bership.

"If the publication of the list be in itself lawful, there
"seems no occasion for any such restriction. On the other
"hand, if it be unlawful, the Lord Ordinary cannot help think-
"ing that the disguise is a very thin one, and that, where a

" paper is printed, and circulated among hundreds, or thousands " of persons, for business purposes, even although the penalty " of stopping delivery of their copies in future should they " communicate the intelligence to others, be enforced,—this, in " truth and substance, amounts to publication. It is not pre- " tended that the members or subscribers have any direct con- " nection with any of the parties, or with the debts which are " entered in the list. On the contrary, all the members desire " information as to all registered protests of every debtor in the " kingdom; and they contend that any number of persons, that " is, the public at large, are entitled to subscribe, for the pur- " pose of printing and circulating, among all who do subscribe, " this list, which it appears, according to the current phrase- " ology, is denominated the 'Black List.' In other words, any " person may become a member of the society, that is, obtain a " copy of the paper, upon payment of the price, just as he " might subscribe to any newspaper. There is no qualification " required for membership; and the condition, that he shall not " show the paper to others, even if it could be enforced, becomes " utterly nugatory, when any one who wishes it may obtain that " information upon payment of the price.

" The interdict here sought is against entering the name of " the complainer in the list, as a party against whom two protests " have been recorded in the General Register, and against pay- " ment of which, he states, he has good grounds of objection. " Although, no doubt, access may be had to that register for all " lawful purposes, it is not one instituted for the purpose of " publication. It was established by the Act 1681, c. 20, " which declares, that protests upon bills of exchange 'shall be " ' registrable within six months after the date of the bill, in " ' case of non-acceptance, or after falling due thereof, in case " ' of non-payment, in the Books of Council and Session, or " ' other competent judicatures, at the instance of the person to " ' whom the same is made payable, or his order, either against

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" ' the drawer or indorser, in case of any protest for non accept-
" ' ance, or against the acceptor, in case of a protest for non-
" ' payment, to the effect that it may have the authority of the
" ' Judges thereof interponed thereto, that letters of horning,
" ' upon a simple charge of six days, and executorials necessary
" ' may pass thereupon, for the whole sums contained in the
" ' bill, as well exchange as principal, in form as effeirs; sick-
" ' like, and in the same manner, as upon registrat bonds, or
" ' decrees of registration proceeding upon consent of parties.'
" The object of this Act was merely to give a registered protest
" the force and effect of a decree. The names of the parties are
" not required to be published for any purpose prescribed by
" the Act. It is clear that the publication of a party's name in
" a list containing sequestrated bankrupts, and all whose pro-
" tested bills have been registered within Scotland, to which
" list all may have access who choose to subscribe,—may be
" attended with the most injurious consequences, and his credit
" utterly ruined. The bill may have been allowed to be pro-
" tested and the protest recorded through error, absence, or
" inadvertence. There may have been error even on the part
" of the creditor. There may be good ground for disputing the
" debt; and yet, in ignorance of all the circumstances, the fact
" that a protest has been recorded against a man of business is at
" once made known to 300, or 3000, or any number of bankers
" and merchants throughout the kingdom, and his credit is
" gone. Nay, even a stronger case may be put. Where a
" party accepts a bill for the accommodation of the drawer,
" and where, being in good credit, he gets the bank who dis-
" counted the bill which has been dishonoured to allow him to
" do diligence in their name against the true debtor under the
" recorded protest, yet here, of course, his name will appear in
" this list, and be circulated throughout the country, without
" any explanation, as a party apparently unable to retire a bill
" of which he is the acceptor. Is this a legitimate use of the
" Register of Protests?

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"There is another view of the matter which also induced the "Lord Ordinary to take this case to report. If it shall be held "that this list is substantially a publication, and that the circu- "lation of such a list is not a legitimate use of the record, then "it will be proper to consider, whether, besides giving the "individual interdict here sought, some steps may not be "necessary to prevent the keeper of the register from giving "copies in future for the purpose of such publication. The "Lord Ordinary had no difficulty in granting the interim inter- "dict, as in no view could this do any harm to the Respond- "ents. But the matter being now brought before the Court, "they will have a full opportunity of having the views of the "Lord Ordinary corrected, in so far as these may be erroneous."

The Court ordered minutes of debate to be prepared, and laid before the whole judges for their opinion, and on the 10th March, 1846, in conformity with the opinions of a majority of the consulted Judges, passed the note of suspension, and continued the interdict. The appeal was taken against this interlocutor.

Mr. Wortley and *Mr. Gordon* for the Appellants.—The complaint here is of an intention to publish the name of the Respondent, as having dishonoured two promissory notes, by non-payment of their contents, not because the information proposed to be given by the publication is false or erroneous, but because it may be injurious to the party; but

In the first place, the fact of a party having dishonoured a bill or note is not a private matter, it is open and patent by the Records to all the world. By the Act 1681, applicable to foreign bills of exchange, extended by the Act 1692 to inland bills, and by 12 Geo. III., cap 72, and 23 Geo. III., cap. 18, to promissory notes, the protest upon a bill or note is to be registered in the books of the Court of Session, "to the effect "it may have the authority of the Judges thereof interponed

" thereto, that letters of horning, upon a simple charge of six " days and executorials necessary, may pass thereupon for the " whole sums contained in the bill, as well exchange as prin- " cipal, in form as effeirs, sicklike and in the same manner " as upon registrate bonds or decrees of registration, proceeding " upon consent of parties."

The practice in compliance with this statute, is strictly of a judicial nature. The entry in the books of the Court, both in form and effect is precisely the same, *mutatis mutandis*, as in the case of a decree formally contested. Not only are the public *entitled* to be present at the pronouncing of decrees in open Court, *but* the 1 and 2 Vict., cap. 118, provides for the knowledge that *might* be thus acquired, being communicated to those who have *not* had this opportunity, by enacting that " the minute book of " the Court of Session," containing the entries of its decrees, " shall be printed and sold by the keeper thereof, and shall be " sold to the public at the lowest rate which will defray the neces- " sary expense of printing the same." As the public have a right, not only to be present at the pronouncing of a decree in *foro contentioso*, but to procure printed information of it, and to avail themselves in the ordinary pursuits of life, of the information thus acquired, so upon every principle they must be equally entitled to do so, where the decree passes *sub silentio* by consent of the party, for every reason for publicity which applies to the one case applies to the other. But, independently of reasoning upon principle, this register of protests, like all the other registers in Scotland, is by the Act of Regulations, 1695, public property. By that act, which has all the force of a statute, it is enacted, " that the registers immediately under the clerk regis- " ter's keeping in the Lower Parliament House, or anywhere else, " be *patent to all the lieges*, without any payment or other " acknowledgement of that sort to be made to any for sight of " the minute book," and specified fees are authorised for searches in the Record itself; no limit is here made as to whom the

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register is to be patent to,—to the creditor or debtor in the bill or note for instance, or some one having authority from them, but it is "to all the lieges." And the 55 Geo. III., cap. 70, which is entitled "an Act for better regulating the formation and "arrangement of the judicial and other records," proceeds upon a preamble that "the due arrangement of the judicial records "is essential to the usefulness of that class of the public Re-"cords."

The 1 and 2 Geo IV., cap. 38, in its 27th section, provides that "whereas it is expedient that the keepers of the several "registers of records of sasines, reversions, abbreviates of ad-"judications, inhibitions, and deeds and probative writs, recorded "in the books of Council and Session, should form alphabetical "indexes of the persons and matters to which those records "relate, for the purpose of easy reference to the same respec-"tively," the Court of Session should have power to regulate by act of sederunt the form of the indexes. And the 3 Geo. IV. lays down a table of fees for inspection of the record, when there is no minute book, of the record when there is a minute book, and of the documents recorded themselves. Anyone who chooses to pay those fees has a right of access to the record, which no one can refuse him; and in practice nothing further is asked of him by the keeper, indeed it could not well be otherwise, for if the keeper were entitled to ask what interest a party, asking inspection of the record, had in the matter of the record, he must of course have the power of saying whether the party had established a sufficient interest, and of refusing or allowing inspection accordingly. But such a state of matters would be altogether irreconcileable with the Act of Regulations, 1695, that the records are to be "patent to all the lieges."

Publicity, as to every man's circumstances, is in truth the principle of Scotch jurisprudence. Every burden or judgment affecting lands must be put upon record, which by the Act 1695, is open to all the lieges. So the mode of execution against the

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estate of debtors in one step of it—denunciation, was public. "The intent thereof," as *Stair* expresses it, III., 3, 8, "being "that the publication thereof may come to the ears of the "country, and be carried by common fame, that all parties may "look to their interest." And *Bankton*, IV., 4, 18, speaking of the registers of deeds for execution says, "these are not only "useful to found summary execution against the granters of "such registrable writings, but likewise in order to discover the "circumstances of persons."

In short, all the public registers of Scotland, whether of judicial proceedings, of deeds, or notarial or public instruments, whether for preservation or for preservation and execution, are accessible to every body, who, for any legitimate purpose, may by their means possess himself of the information they afford.

II. The Appellants, being all engaged in trade, have a material interest to know the solvency of the parties with whom they are about to deal; the communication to the general body is not done therefore in idleness, to gratify any unworthy or improper motive, but to communicate to each that information which is necessary for his safety in business; and if individually, they may use the records as sources of information, the body may, on the same principle, do it by their agent. Each man may search the record for himself either personally, or by his clerk, and the officer of the society is no other than the agent or clerk of all the members.

III. If the Appellants may lawfully procure this information, and communicate it to each other, there doing so will not become unlawful because it may by possibility be injurious; the inference, from the circumstance that a man has not paid his bill, is not necessarily that he is unworthy of credit,—it may have that effect with some minds, while with others it may produce no other effect than suggesting the necessity for inquiry as to the reason of non-payment. But the statement of the fact of non-payment is not a statement of either of these inferences, nor

can the party be answerable for either of them. Indeed, to all properly constituted minds, the second inference is the one which would be drawn; for there are many reasons why a bill may have been dishonoured, besides the party's inability or unwillingness to pay, and it is notorious to every one, that the Appellants cannot know, and do not profess to give the true reason, but intend only to communicate the bare fact of non-payment, and that not for the idle purpose of meddling with their neighbour's affairs, but of enabling themselves, as prudent merchants, to conduct their dealings with safety. If their statement be true, then they can no more be liable for the injurious inference which peculiar minds may possibly, but not necessarily, draw from it, than a party can in any other case be liable for an injurious inference, drawn from any other statement harmless in itself. The fact proposed to be stated in this case is true; it is public upon the records, which are open to every one,—and it is to be stated for a legitimate purpose and to those having a legitimate interest to know it. It is difficult to discover any ground upon which the interdict therefore can be supported.

Mr. Bethell and *Mr. Anderson* for the Respondent.—It is not possible to dispute that the printing and circulation of the Appellant's circular, though confined to their own body, is a publication, to all those at least engaged in the operation of printing and of such circulation. And the injury to the Respondent from this publication is manifest, by the benefit which the Appellants propose to themselves from it, as shown by the regulations under which they act. The benefit they propose to themselves is the knowledge of persons of "doubtful credit," and the injury they inflict upon the Respondent is the being held out to the world as such. This benefit may be very desirable to these parties, and very essential to the safe conduct of their business, but what possible right can that give them to do the injury to the Respondent, which being held out as a

person of doubtful credit, must necessarily entail, upon his respectability as a merchant, and without the possibility of his warding it off, in case persons should decline doing business with him, because of the appearance of his name in the Appellant's list, but without assigning this as the reason.

The effect of the publication is neither more nor less than a slander upon the Respondent, not merely by the statement of his promissory notes having been dishonoured, but by the inference intended to be drawn from that circumstance. If the Appellants were in any way interested in the transaction, and thus cognisant of its circumstances, they might or they might not be justified in publishing it; but, admittedly, they are not,—they are no way interested in the transaction,—and they know nothing of its circumstances, further than the mere fact of the protest having been registered: yet they publish that fact as inferential evidence of the Respondent being a merchant of doubtful credit, and associate his name with that of persons who undoubtedly must be of that character; such as bankrupts and pursuers of processes of *cessio bonorum*. The obvious inference from the publication is, that the notes are justly due, and that their protest has been occasioned by an inability on the part of the Respondent to pay, although there may be half a dozen other reasons why the notes have been dishonoured, accident, mistake, forgery, want of consideration, or the like, and should the cause have been obviated, and the notes paid after the Appellant's list is published, there is no way by which the Respondent could remove the injury done to his credit by the appearance of his name. There it would remain.

Not only are the Appellants total strangers in the transaction in question, but they never had, nor is it alleged they ever contemplated having, any transaction whatever with the Respondent; they have no legitimate interest therefore to inquire into his solvency, and still less to publish to others any circumstance which may give an injurious or doubtful opinion of it.

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II. But it is said the register of protests is open, and intended for publication;—this is to confound the character of the different registers, some of which are expressly for publication, while others, of which the register of protests is one, are for execution only. The mere fact of possession of personal property gives the possessor the character of owner, and entitles the world to deal with him as such; there is no way, therefore, in which a right can be constituted over moveables apart from the possession of them; no register therefore, is required in order to fix the character of ownership. It is otherwise, however, with real property; in regard to it the law has declared that the register, and it alone, shall evidence ownership,—accordingly, all land rights must be registered, and *ex necessitate* the registers must be open to the public, as publication is their purpose; such are the register of sasines, of reversions, of tailzies, of adjudications, and of inhibitions. The Act 1617, cap. 16, declares that the register of sasines "shall be patent to "all our sovereign lord's lieges;" but even as to it extracts of the record are to be given only "to all as shall have adoe with "the same;" and the Act 1672, cap. 19, in regard to adjudications, and of 1581, cap. 119, relating to inhibitions, all show an express purpose of publication. And, in regard to all these, the existence of a right to land, or of a burden upon it, and the discharge of that right or burden must appear upon the record.

On the other hand, as to moveable estate, though there are registers with respect to it, such as the register of deeds, of probative writs, and of protests,—these are for preservation only, or for preservation and execution. They neither are intended nor can they serve for publication. To take the register of protests, for instance,—it will shew the fact of a protest upon a particular note having been taken; but the note may have been paid the next half-hour afterwards; this fact, however, cannot enter the record. For the purpose of publication, therefore, of the true state of matters, this register is entirely nugatory. If a

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sasine upon an heritable bond appear upon the register of sasines, the world may and must believe the granter of the bond to be debtor in its amount, but so soon as he pays off the bond the discharge is put on the same register. But if a protest upon a promissory note is registered, nothing further appears. Accordingly, the express object of the Act 1681, cap. 20, for the registry of protests, is, that bills "may have ready execu-"tion," without mention, as in the statutes which have been noticed in regard to real rights, of the register being open to the lieges; and by none of the institutional writers are the records for execution treated as intended for publication—*Bankt.*, IV., 4, 18; *Ersk.*, II., 5, 54; *Ersk.*, III., 5, 6.

But though the register of protests were embraced by the Act of Regulations, 1695, which is not so certain, without evidence that it was then "immediately under the clerk "register's keeping," yet it does not follow that, because a register is to be "patent to all the lieges," this is to be taken literally to mean all, whether with or without an interest in the matter; but rather as implying all having such an interest; and still less will it imply a right in each individual not only to inspect the record personally, but to publish the result of his inspection to others.

III. It is, no doubt, true that the registration of the protest upon a note is equivalent in its effect to a decree for payment in favour of the creditor. It gives him the same warrant for execution; but, by the agreement of the parties, it is a private proceeding withdrawn from the public; and unless the publication in question can be justified, as being a publication of part of a public record, it can never be justified as publication of a decree of Court, which is only by fiction.

LORD CHANCELLOR.—My Lords, If it were necessary to lay down a rule respecting the jurisdiction which has been exercised in this case by the Court of Session, in granting

interdict against the publication of libels, this case would be one of the highest importance, and of the greatest difficulty, in the present state of information submitted to this House, for it is impossible to read the observations of the learned Judges, without seeing that there is in them much want of precision, and indeed of acuteness upon the subject; but being of opinion that the general question is not necessarily involved in the consideration of the appeal, I think it expedient under the circumstances not to give any opinion upon the general question. But I cannot avoid expressing an earnest hope, that if this question should arise and require decision in the Court of Session, and no distinct rule should be found upon the subject, that the consequences of any rule to be established for the first time will be most carefully considered, and particularly how the exercise of such a jurisdiction can be reconciled with the trial of matters of libel and defamation by juries, under the 15 George III., chapter 42, or indeed with the liberty of the press. That Act appoints a jury, as the proper tribunal for trial of injuries to the person by libel or defamation; and the liberty of the press consists in the unrestricted right of publishing, subject to the responsibilities attached to libels public or private. But if the publication is to be anticipated and prevented by the interdict of the Court of Session, the jurisdiction is taken from the jury, and the right of unrestrained publication is destroyed. And I must add that, according to the doctrine attributed to the Lord Justice Clerk in the printed report of his judgment, the exercise of this power would be quite arbitrary, for he considers that the right to claim damages, if the act had been committed, is not the test according to which the interdict must be granted or refused.

I do not pursue the question further, because, assuming the jurisdiction to be as extensive as it is claimed, I think that in this particular case it has been improperly exercised.

Bills and notes dishonoured and protested are by certain

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Acts of Parliament to be registered, of which bills the Defendants are in the practice of publishing a list, and the object of the interdict is to restrain the Defendant from printing in such lists the name of the pursuer, that is, he, thereby admitting the fact that the two bills in question have been dishonoured by him, prays that fact may not be published; but he himself, by the application for the interdict, not only admits the fact, but gives to that fact a greater degree of publicity than would have attended it, if his name had been inserted in the list. If the publication intended had been a narrative or statement injurious to the party complaining, and which he had a right to prevent, the observation would not apply, but in this particular case the jurisdiction by interdict being to prevent a wrong we find it exercised in a case in which it could not possibly have any such effect. I found my opinion, however, upon this, that the publication of the fact proposed to be inserted in the Defendant's list, has been made by Act of Parliament public property and the publication of it authorized.

The Act of 1681 cap. 20 enacts, that foreign bills shall be registerable in the books of Council and Session "to the effect "that it may have the authority of the Judges" for process to issue "sicklike, and in the same manner as upon registrat bonds "or decrees of registration proceeding upon consent of parties." Subsequent Acts included inland bills and promissory notes. The effect of this is to give this registration the effect of a decree or judgment of the Court of Session. It is what in this country we call a judgment upon a warrant of attorney. In neither case does the Court interfere, but in both, as in cases of judgment by default and decree in absence, the party having a right to the authority of the Court to confirm his claim obtains the judgment as of course. Whether it be obtained by authority of Parliament, or by the consent of parties, or by the practice of the Court, appears to me to be immaterial. It is for all purposes a judgment of the Court until altered or reversed,

and entitled to all the attributes of any judgment after the longest and most contested litigation.

This indeed is not in dispute. The Lord Justice Clerk says in his judgment "I hold the register to be a proper record of "Court, as much as the actual book of procedure now on the "table, and entered up from day to day by the clerks. The "party appears with his protest, and asks the Court for a certain "decree upon it; which decree is not obtained by deliverance "which leaves the Court, but by an entry in the book of "Court."

Is it then unlawful to state or publish the decree or judgment of a Court of Justice? If their proceedings are public, so must the result of such proceedings, namely, the judgment, be. For although the steps preliminary to the judgment are not transacted in open Court, the whole being incontestible in that stage, yet the whole is supposed to be the result of regular proceedings. The register, therefore, is, in its nature, public, but it is especially made so for purposes distinct from the object of giving effect to the right of the party. So *Lord Bankton* states in the passage referred to, IV., 4, 18. The Act of Regulations of 1695 provides, that the register under the clerk register's keeping be patent to all the lieges. This includes the books of Council and Session, in which the entry of protests are kept. The 55th George III., cap. 70, regulates the keeping of registers of deeds and instruments of protest. Section 27 of 1 and 2 George IV., cap. 38, provides for making indexes to certain and divers registers, and amongst others, adjudications recorded in the books of Council and Session, for the purpose of easy reference, and that they may be made accessible to the public. It appears that in fact no index was made of the register of protests, but by the table of fees a different fee is payable for searches where there is and where there is not an index, so that the contents of all the registers, whether with indexes or not, are open to the public upon payment of a certain fee.

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So far are any proceedings of the Court from being considered shut against the public, that by 1 and 2 Victoria, cap. 118, sect. 22 it is provided, that the minute book of the Court of Session and Teind Court, the record of edictal citations, the weekly calling list of causes, and the weekly printed roll of Outer House and Teind causes, "shall be printed by the re- "spective keepers thereof, and shall be sold to the public at the "lowest rate which will defray the necessary expense of printing "the same."

From these references it appears to me clear that the legislature have thought that the public at large ought to have recourse to this register, and of all the public, the Defendants have the highest interest in the knowledge or its contents. They are engaged in mercantile affairs in which their security and success must greatly depend upon a knowledge of the pecuniary transactions and credit of others. That each of them might go or send to the office and search the register is not disputed; and that they might communicate to each other what they had found there, is equally certain; but what they have done is only doing this by a common agent, and giving the information by means of printing. No doubt if the matter be a libel this is a publication of it, but the transaction disproves any malice, and shows a legitimate object for the act done.

I think, therefore, that upon this view of the case alone, the Respondent has failed to establish any title to the interdict, which, though *ad interim* only, must be discharged, unless shown to rest upon some tenable ground. Now it is admitted that no case can be produced in which such an interdict has been supported. The proceeding in its nature is much in the direction of the Court, and most so when the case is perfectly new. In the exercise of that discretion, I think the Court of Session ought to have refused the interdict, and therefore advise your Lordships to reverse this interlocutor, with costs below.

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Ordered, That the interlocutors, in so far as complained of in the appeal, be reversed; and that the cause be remitted back to the Court of Session in Scotland, with directions to that Court to recall the interdict granted by the Lord Ordinary, and continued by the Lords of Session of the Second Division, and to refuse the note of suspension and interdict, at the instance of William Hood Newton, the Respondent, against the Appellants. And it is further ordered, That the said Respondent do pay to the said Appellants the costs incurred by them in the Courts below. And it is also further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just.

GRAHAM and WEEMS—ALEXANDER ROBERTSON, Agents.

[24*th February*, 1848.]

MESSRS. DUNLOP, WILSON, and Co., Ironmasters in Glasgow, *Appellants.*

MESSRS. VINCENT, HIGGINS, & SON, Merchants in Liverpool, *Respondents.*

Sale.—If an offer to sell be answered by a letter put into the post-office, the contract of sale is completed, and the purchaser is not answerable for delay in delivery of the letter, arising with the Post-office.

Sale.—*Damages.*—The question of amount of damage for non-performance of a contract of sale, is not confined to the difference between the contract price and the market price on or about the day on which the contract was broken, but is to be left to the jury for consideration, upon all the circumstances of the case, of what will best compensate the party.

ON the 20th of January, 1845, the Respondents wrote the Appellants to know whether they could sell to them 2000 tons of pig iron. On the 22nd, the Appellants answered, "We will "be glad to supply you with 2000 tons of pig, at 65*s.* per ton "net, delivered here."

On the 25th, the Respondents wrote, "you say 65s. net for "2000 tons pig. Does this mean for our usual four months' "bill? please give us this information in course of post, as we "have to decide with parties on Wednesday next." To this the Appellants answered, on the 28th, "In reply to yours of the "25th instant, our quotation meant 65*s.* net, and not a four "months' bill."

On the 29th, the Respondents wrote the Appellants, "Your "offer is 2000 tons of pigs at 65*s.* per ton net delivered here. "Now, we want to know whether you mean 65*s.* net, for our

" usual and customary draft, and if delivery is to take place on " completion of present contracts, and in same quantities *per* " month? If you have not already despatched this information " to us, please do so in course of post, and at the same time, " state if you will accept of an order for 3000 tons instead of " 2000 tons."

The Respondents received the letter of the Appellants of the 28th on the 30th, and in the evening of that day they wrote them, " We will take the 2000 tons pigs you offer us. Your letter " crossed ours of yesterday, but we shall be glad to have your " answer respecting the additional 1000 tons. In your first letter " you omitted to state any terms; hence the delay." This letter was by mistake dated the 31st of January.

On the 1st February, the Appellants replied, " We have your " letter of yesterday, but we are sorry that we cannot now enter " the 2000 tons pig iron, our offer of the 28th not having been " accepted in course." On the 3rd February, the Respondents wrote, " On referring to our letter accepting your offer of 2000 " tons pig iron, we find we dated it 31st January, whereas it was " written on Thursday the 30th, and we can prove that it was " posted on that day. Of course the 2000 tons is now booked, " and we wait your answer to our inquiry respecting the addi- " tional 1000 tons."

On the 3rd of February, the price of pig iron was still 65*s.* per ton, but on the following day it rose 5*s.* per ton, and in the course of the month it reached 80*s.* per ton, and gradually ascended, until in the month of April it was as high as 110*s.*

At the time at which this correspondence took place, two mails were dispatched daily from Liverpool to Glasgow, one at 1 o'clock in the morning, the letter-box for which closed at midnight; and the other at a quarter past 4 o'clock in the afternoon, the box for which closed at a quarter past three o'clock.

From the private post-mark on the letter, written on the 30th, but dated the 31st, it appeared that it had been put into

the post-office at Liverpool between a quarter past 6 and a quarter past 8 o'clock in the evening of the 30th. According to the regular course of post, this letter should have been dispatched from Liverpool at half-past 1 o'clock in the morning of the 31st of January, and it should have reached Glasgow in about twenty-two or twenty-three hours thereafter, or about half-past 11 at night of the 31st; but owing to some interruption of the mail it did not reach Glasgow until 1 o'clock in the afternoon of the 1st February, and the letters were of course not delivered to the merchants till later in the same day.

In these circumstances the Respondents brought an action against the Appellants, concluding for the damage incurred by them "in and through the refusal of the Appellants to deliver "the 2000 tons of pig iron in terms of their contract, and "generally in consequence of their breach and non-implement "of the same."

The Appellants pleaded in defence, that according to the practice of merchants in the iron trade, their offer was not binding unless accepted in course of post; and as it had not been accepted in time it was not binding.

This action was advocated from the Sheriff Court, in which it had been brought, to the Court of Session, where it was sent for trial, upon the following issue, "Whether about the end of "January 1845, the Pursuers purchased from the defenders "2000 tons of pig iron, at the price of 65*s.* per ton, and "whether the Defenders wrongfully failed to deliver the same, "to the loss, damage, and injury of the Pursuers."

Upon the trial of this issue, the Appellants objected to the examination of one of the post office clerks, with a view to show when the letter dated the 31st January was put into the post-office at Liverpool, and ought to have arrived at Glasgow, because "the Pursuers having admitted that they were bound to "answer the Defenders' offer of the 28th, by letter written and "posted on the 30th, and the only answer received by the

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"Defenders being admitted to be dated 31st January, and "received in Glasgow by the mail, which in due course ought "to bring the Liverpool letters of the 31st, but not Liverpool "letters of the 30th—it is not competent in a question as to "the right of the Defenders to withdraw or fall from the offer, "to prove that the letter bearing date the 31st January, was "written and dispatched from Liverpool on the 30th, and pre-"vented by an accident from reaching Glasgow in due course, "especially as it is not alleged that the Defenders were aware, "(previous to the 3rd February,) of any such accident having "occurred."

This objection was overruled by the Judge who tried the cause, and an exception was thereupon taken by the Appellants to the admission of the evidence.

In the course of the trial a number of merchants were examined, as to the time within which the Respondents' offer should have been accepted;—some thought, where nothing was said about the course of post, that the party might take the day on which he received the offer to consider, and answer it on the following day. Others did not draw any distinction between an offer to be answered in course of post and one without that condition, and thought that both ought to be answered on the day on which they were received, without regard to whether a mail was despatched once or twice in the day. While others thought that an offer to be answered in the course of post should be answered by the very first mail dispatched after receipt of it.

In charging the jury, the Judge stated that "he adopted the "law as duly expounded in the rubric of the case of Adams and "Others, 6th June, 1818, in *Barnwell & Alderson*, and which is "as follows:—'A by a letter offers to sell to B certain specified "'goods, *receiving an answer by return of post;* the letter being "'misdirected, the answer notifying the acceptance of the offer "'arrived two days later than it ought to have done; on the "'day following that when it would have arrived, if the original

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"'letter had been properly directed, A sold the goods to a "'third person: Held that there was a contract binding the "'parties from the moment the offer was accepted, and that B. "'was entitled to recover against A in an action for not com- "'pleting his contract.'"

Thereupon the Appellants tendered these four exceptions to the charge:—"In so far as his Lordship directed the jury, in "point of law, that if the Pursuers posted their acceptance of "the offer in due time according to the usage of trade, they are "not responsible for any casualties in the post-office establish- "ment.

"In so far as his Lordship did not direct the jury, in point "of law, that if a merchant make an offer to a party at a "distance by post letter, requiring to be answered within a cer- "tain time, and no answer arrives within such time as it should "arrive, if the party had written and posted his letter within "the time allowed, the offerer is free, though the answer may "have been actually written and posted in due time, if he is not "proved to be aware of accidental circumstances preventing the "due arrival of the answer.

"In so far as his Lordship did not direct the jury, in point "of law, that in the case above supposed, if an answer arrives, "bearing a date beyond the time limited as above for making "answer, and arrive by a mail, and be delivered at a time cor- "responding to such date, the offerer is entitled to consider "himself free to deal with the goods as his own, either to sell "or to hold, if he be not in the knowledge that the answer "received was truly written of an earlier date, and delayed in "its arrival by accident.

"In so far as his Lordship did not direct the jury, in point "of law, that in case of failure to deliver goods sold at a stipu- "lated price and immediately deliverable, the true measure of "damage is the difference between the stipulated price and the "market price, on or about the day the contract is broken, or

" at or about the time when the purchaser might have supplied " himself."

Thereafter the jury found a verdict for the Respondents, and assessed the damages at 1500*l.*

Upon the hearing of the exceptions, the Court (on the 2nd of July, 1847) disallowed them all, and against this interlocutor the appeal was taken.

Mr. Bethell and *Mr. Anderson* for the Appellants.—I. The offer of a merchant for the sale of his goods is in every case under an implied condition of acceptance within a certain time; and according to the custom of merchants, that is, the return of the post on the day on which the offer is received, till which time, and no longer, the offer enures.

This circumstance, of due acceptance of the offer, is, therefore, a condition precedent in the contract of sale,—until it is made there is no contract; for nothing can be substituted for performance of a condition precedent. The arrival of the day on which the post returned without any acceptance, purged the condition therefore, and put the offerer at liberty to treat the transaction as at an end. Where the condition is subsequent the matter is different; for non-performance of a condition subsequent there may be many excuses receivable, such as the act of God, of the king's enemies, or the impossibility of the thing. But where the condition is precedent nothing can excuse its non-performance, so as to admit of a right being vested in the party by whom the performance should be made. This is illustrated by the case of Brodie *v.* Todd, 17 *F. C.* 609. There Todd & Co. transmitted bills of lading for the goods sold, with a bill drawn for the price, which they requested might be returned "in course" of post. This not having been done they were held to be justified in re-landing the goods from the vessel, which had not yet left the port of shipment.

[*Lord Chancellor.*—If putting a letter into the post-office is

acceptance there is no condition broken. In *Brodie's* case an express condition was broken.]

The condition here was, that the seller was to have acceptance within a given time, and no effort of the purchaser which did not accomplish that could avail to give him a right against the seller. In *McDougal's Inst.* i., 4, 24, it is said, "An offer "has an implied condition of acceptance, whereby alone the "party accedes and converts the offer into a contract, so that "it is not binding but ambulatory or revocable till it is accepted, "and therefore revocation by the offerer, or death of either "party before acceptance, voids it."—In Horsley *v.* Hood, 6 *Durn. & East*, 710, where the condition of a policy of insurance against fire was, that the assured should procure the certificate of the minister and churchwardens of the parish that they knew his character, and believed he had sustained the loss without fraud, the obtaining the certificate was held to be a condition precedent to the right to recover, which was not purified by the wrongful refusal of the minister to grant the certificate. And in Davidson *v.* Mure, 3 *Doug.* 28, where the condition of a marine insurance against capture was that if, in case of capture, it should appear to a court martial that the best defence had been made, the insurers would pay, the finding of a court martial to this effect was held to be a condition precedent to the right to recover, not discharged by the circumstance that, during the war in which the capture occurred, there had not been any similar court martial held. The anxiety of the Respondents, therefore, however urgent, to accept the offer within the time necessary could not dispense with the necessity of that acceptance, although the delay was occasioned by a circumstance beyond their control. The consequences of any other doctrine would lead to anomalous and unjust results, for if posting acceptance is enough without regard to its receipt, what is the offerer to do where the market for the commodity offered is fluctuating: if he must wait a day the change in price may be most serious. Where the acceptance of an offer is not received, the inference

is as strong that the offer has been declined as that the acceptance has miscarried. At whose risk, while the market is fluctuating, is the offerer to wait in order to ascertain which is the correct inference? why should it be at his own when the delay is no way imputable to him? In the present case, if the market had fallen instead of rising during the delay, and no acceptance of the offer had ultimately arrived, the Appellants could not have come upon the Respondents for the loss; why should the Respondents be entitled to come upon them for the loss when the market went the other way? If they may, then an offerer *must* suffer unless the market be quite stationary, and without any limit to the amount of his risk, for many days may elapse before the miscarriage of the acceptance or refusal is discovered and rectified.

The true and just view is, that there is no contract between the parties to enforce either way. The post-office must be regarded as their common agent; and as it failed in the due performance of its duty, the consequence ought to be, that no obligation arose on either side. The negotiation failed by an action growing out of their mutual arrangement. This is a mode of solution consistent with reason and easy of perception; but to draw the construction, which the judgment below does, is contrary to reason and fraught with injustice. If the delay in acceptance was not occasioned by the fault of the Respondents, so neither was it occasioned by any fault of the Appellants. What reason is there, then, why the Appellants should bear the loss rather than the Respondents? but by declaring the negotiation at an end, and no obligation to have arisen out of it, as both are faultless, so both are remitted to their original position.

The case has been likened to that of a dishonoured bill, in which proof that the holder had put a notification into the post-office has been held sufficient to entitle him to recover, without regard to whether the notification was received; but there is the greatest difference between whether a party has lost a right to

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recover by laches on his own part, and whether another has gained an advantage by performance of something precedently required.

II. Where damages are claimed for non-fulfilment of a contract of sale, the true criterion of the amount of damage is the difference between the price at which the goods were sold and the market price of the day, on or about which the contract was broken. This was held in Gainsford *v.* Carroll, 2 *Bar. & Cr.*, 624, and other cases; and in Shaw *v.* Holland, 4 *Railw. Ca.*, 161, was recognised as an established rule. In the present case, the Judge did not lay down any such rule to the jury, but left the case with them upon its whole circumstances. The theory of the rule is, that the purchaser, having still his money in his pocket, may on the day on which the contract is broken go into the market and buy the article from another, and therefore all he can justly ask as damage is the difference between the price which he so pays, and that which he contracted to pay. This rule does substantial justice between the parties, and if the Respondents had followed it on the 3rd of February, when they received the Appellant's letter disavowing the contract, the damage would have been *nil*, as the price still continued the same, whereas the jury have assessed the damage at 1500*l.*

Mr. Wortley and *Mr. H. Hill* for the Respondents.—Where an offer is made generally, without any condition as to the period of acceptance, it binds as soon as acceptance is given, unless it have been previously recalled. And if the acceptance be made by letter through the post-office the contract is concluded, without regard to when the acceptance may reach the offerer, there is thenceforth *concursus et conventio in idem placitum.*—*Bell's Com.*, vol. i., p. 326. The necessities of trade have adopted the post-office as the means of conveyance of letters, and the law of the country allows of none other, but in no sense is the post-office the agent of the party—over it he has no control

one way or other; so soon as his letter is dropped into the mail-box he ceases to have any power over it. But in truth it is the act of acceptance not the receipt of the acceptance which binds the contract; and were it otherwise, as was observed in *Adams Lindsell*, 1 *Barn. & Ald.*, 681, where this question as to liability for the default of the post-office was raised and decided, no contract could ever be completed through the post-office.

In the present case no stipulation was made as to the acceptance of the offer in course of post, but even if it had been made, the course of post does not limit the party to the lapse of any particular period of time, but to the actual arrival of the post. This must be so where the mail is carried by sea, for no certain time of arrival can be secured, and may be so where it is carried by land, and snow-storm, or other uncontrollable accident, has prevented its arrival. If this is the case when an express stipulation as to the course of post is made, how much more obviously must the party's right be exposed to these contingencies where, as in the present instance, he makes no such stipulation.

III. Whatever may be the rule in England, as to the mode of ascertaining the amount of damage in such a case, it is well established in Scotland, that this is peculiarly a question for the jury, to be decided on a view of all the circumstances having regard to what will fully compensate the party for breach of the covenant to give him, that which, if it had been given to him, would have been within his own power to hold or dispose of. This was fully recognised in Watt *v* Mitchell and Co., 1 *D. B.* and *M.*, 1157, as the established rule in questions of this nature. Accordingly the exception upon this ground was but feebly argued in the Court below, where it was considered as having been abandoned.

LORD CHANCELLOR.—My Lords, everything which learning and ingenuity can suggest on the part of the Appellants has undoubtedly been urged by their Counsel, and if your

Lordships concur in my view that they have failed in making out their case, your Lordships will have the satisfaction of knowing that you have come to that conclusion after having had everything suggested to you that by possibility could be advanced.

The case certainly appears to me one which requires great ingenuity on the part of the Appellants, because it does not appear that, in the facts of the case, there is anything to support it. The contest arises upon an order sent from Liverpool to Glasgow, or rather a proposition sent from Glasgow to Liverpool, and accepted by the house at Liverpool. It is unnecessary to go earlier into the history of the case than the letter sent from Liverpool by Higgins and Co., bearing date the 31st of January; a proposition had been made by the Glasgow house of Dunlop, Wilson, and Co., to sell them 2000 tons of pig iron. The answer is of the date of the 31st of January, "Gentlemen, we will take the 2000 tons pigs, you offer us." Another part of the letter refers to other arrangements, but there is a distinct and positive offer to take the 2000 tons of pigs. To that letter there is annexed a postscript, in which they say, "We have accepted your offer unconditionally, but "we hope you will accede to our request as to delivery and "mode of payment by two months' bill."

That, therefore, is an unconditional offer by the letter dated the 31st of January, which was proved to have been put into the post-office at Liverpool on the 30th, but it was not delivered owing to the state of severe frost at that time, which delayed the mail from reaching Glasgow at the time at which, in the ordinary course, it would have arrived there. It ought to have arrived on the following day, on the 31st of January, but it did not arrive till the 1st of February.

It appears that between the time of writing the offer and the 1st of February, the parties making the offer had changed their mind, and, instead of being willing to sell the 2000 tons

of pig iron on the terms proposed, they were anxious to be relieved from that stipulation; and on that day, the 1st of February, they say, "we have yours of yesterday, but are "sorry that we cannot enter the two thousand (2000) tons "of pig iron, our offer of the 28th not having been accepted "in course."

Under these circumstances the parties wishing to buy, and by that letter accepting the offer, instituted proceedings in the Court of Session for damages sustained by the non-performance of the contract. I say very little on the first and fourth exceptions, because very little arose on them at the Bar.

The next exception to be considered is the second, and that raises a more important question, though not one attended with much difficulty. The exception is, that "his Lordship "did not direct the jury, in point of law, that if the pursuers "posted their acceptance of the offer in due time, according to "the usage of trade, they are not responsible for any casualties "in the post-office establishment."

Now, there may be some little ambiguity in the construction of that proposition. It proceeds on the assumption that by the usage of trade the 30th was the right day on which the answer should have been put into the post; that by the usage of trade an answer ought to have been returned by the post, and that the 30th was the right day on which that acceptance ought to have been notified. Then comes the question, whether, under these circumstances, that being the usage of trade, the fact of the letter being delayed, not by the act of the party sending it, but by an accident connected with the post, whether the party so putting the letter in on the right day is to lose the benefit which would have belonged to him if the letter had arrived in due course?

I cannot conceive how any doubt can exist on the point. If a party does all that he can do, that is all that is called for. If there be a usage of trade to accept such an offer, and to return

an answer to such an offer, and to forward it by means of the post, and if the party accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control? Is it not the same as if the date of the party's accepting the offer had been the subject of a special contract, as if the contract had been, "I make you this offer "but you must return me an answer on the 30th?" If he puts his letter into the post office on the 30th, that is undoubtedly what the usage of trade would require. He, therefore, did on the 30th, in proper time, return an answer by the right conveyance, the post office.

If you were not to have reference to any usage constituting the contract between the parties but to a specific contract it is quite clear to me that the rule of law would necessarily be that which has obtained by the usage of trade. It has been so decided in cases in England, and none have been cited from Scotland which controvert that proposition, but the cases in England beyond all doubt support it. It is not disputed that it is a very frequent occurrence that a party having a bill of exchange tenders it for payment to the acceptor, and is refused. He cannot get payment. He is bound to give notice to the party who is the drawer, although he may be distant many miles from him, but if he puts a letter into the post at the right time it has been held quite sufficient. He has done all that he is expected to do. As far as he is concerned he has put the letter into the post, and whether that letter is delivered, or not, is a matter quite immaterial, because the act of the post office is one for which he is not responsible.

My Lords, the case of Stocken *v.* Collin in *7th Mee. & Wel.*, 515, is precisely a case of that nature, where the letter did not arrive in time. In that case Mr. Baron Parke says, "It was a "question for the jury whether the letter was put into the post "office in time for delivery on the 28th, the post office mark

" certainly raised a presumption to the contrary, but it was not " conclusive. The jury have believed the testimony of the wit- " ness who posted the letter, and the verdict was, therefore, " right. If a party puts a notice of dishonour into the post, so " that in the course of delivery it would arrive in time, he has " done all that can be required of him, and it is no fault of his " that delay occurs in the delivery." Mr. Baron Alderson says, " the party who sends the notice is not answerable for the blun- " der of the post office, I remember to have held so in a case on " the Norwich circuit, where a notice addressed to Norwich had " been sent to Warwick. If the doctrine, that the post office is " only the agent for the delivery of the notice were correct no one " could safely avail himself of that mode of transmission. The " real question is, whether the party has been guilty of laches."

There is also the other case which has been referred to, which raises the same doctrine, the case of Adams and Lindsell, in 1*st Bar. & Ald.*, 681. That is a case where the letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it in proper time. The party, however, who originally sent the offer, not receiving the answer in proper time, thought he was discharged, and entered into a contract and sold the goods to somebody else. The question was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but before it arrived he said, " I withdraw my offer," therefore he said, " before I " received your acceptance of my offer I had withdrawn it." And that raised the question when the acceptance took place, and what constituted the acceptance. It was argued that " till " the Plaintiff's answer was actually received there could be no " binding contract between the parties, and that before then the " Defendants had retracted their offer by selling the wool to " other persons." But the Court said, " If that were so, no " contract could ever be completed by the post. For if the

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"Defendants were not bound by their offer when accepted by "the Plaintiffs till the answer was received, then the Plaintiffs "ought not to be bound till after they had received the notifi- "cation that the Defendants had received their answer and "assented to it. And so it might go on *ad infinitum*. The "Defendants must be considered in law as making, during every "instant of the time their letter was travelling, the same iden- "tical order to the Plaintiffs, and then the contract is completed "by the acceptance of it by the latter."

Those two cases leave no doubt at all on the subject; common sense tells us that transactions cannot go on without such a rule. Those two cases seem to be the leading ones on the subject, and there has been no case cited to show the contrary.

Mr Bell's commentary lays down the same rule as existing in Scotland, and the contrary to that does not appear to exist.

Now, whether I take that proposition as conclusive upon the objection, or whether I consider it as a question entirely open, whether the putting the letter in the post was or not in time to constitute a valid acceptance, it appears to me, that the learned Judge was right in the conclusion to which he came.

The next exception is the third, which says, "In so far as "his Lordship did not direct the jury in point of law, that if a "merchant make an offer to a party at a distance by post letter, "requiring to be answered within a certain time, and no answer "arrives within such time as it should arrive, if the party had "written and posted his letter within the time allowed, the "offerer is free, though the answer may have actually been "written, and posted in due time, if he is not proved to be "aware of accidental circumstances preventing the due arrival "of the answer."

That raises, first of all, a proposition that does not arise in this case at all. It assumes a contract that requires an answer within a certain time, and it assumes (which is already disposed of by what I have said in answer to the second exception) that

the putting a letter into the post is not a compliance with the requisition of the offer. In my opinion the putting a letter into the post is a compliance with the requisition of the offer; but that question does not arise at all in this case because it is assuming a special contract, and there is no special contract here.

It only remains to call your Lordships' attention to the fifth. The fifth exception is "in so far as his Lordship did not "direct the jury in a point of law, that in case of failure to deliver "goods sold at a stipulated price, and immediately deliverable, "the true measure of damage is the difference between the "stipulated price and the market price, on or about the day "the contract is broken, or at or about the time when the pur-"chaser might have supplied himself."

That raises the proposition generally, and not as the learned Counsel have very properly put it at the Bar on the absence of any special damage, or because there is no rule for damage If that be the law, if that be the rule of damage in all cases of special damage, or in cases of this sort, almost every case must differ as to the amount of damage, and the circumstances which gave rise to that damage. The proposition here is, that if a party proposes to deliver goods at a certain time, the damage against him by a party who suffers by his default, is to be measured by the market price at or about the time of the failure of the contract. They say you are to take it within the time of the failure or at the time when the failure takes place, and the contract is broken. It is laid down as the rule of law that that is the measure of damage that the party is to receive.

Now, my Lords, in the action, and the proceedings here for damage, the party comes to receive compensation for the damage he has sustained. If there be a rule established that in a certain case a certain measure of damage ought to be given, the jury ought not to be permitted to go out of that general rule. But if it is a question for the jury, I cannot see how you can be dis-

satisfied whether they give 1000*l.* or 10,000*l.*; and the learned Counsel for the Appellants felt the force of that. What do you come here for? To obtain compensation for the party not performing his contract. What was there for the pursuer to show? That he had by the contract between the parties entitled himself to 2000 tons of pig iron, and the defendants had subjected themselves to make compensation to him for the damages sustained by their breaking that contract. I am now putting it generally without the cases—that seems to me the good sense of the thing. In my opinion the jury have performed the duty that belonged to them in ascertaining the amount of damage. Suppose, for instance, a party who has agreed to purchase 2000 tons of pig iron on a particular day, has himself entered into a contract with somebody else, conditioned for 2000 tons of pig iron to be delivered on that day, and that he not being able to obtain the 2000 tons of pig iron on that particular day, loses the benefit arising from that contract. If pig iron had only risen a shilling a ton in the market, but by this contract he had lost 1000*l.* upon a contract with a Railway Company, in my opinion he should not only have the damage which would have arisen if he had gone into the market and bought the pig iron, but also that profit which he might have received if the party had performed his contract. Otherwise it is difficult to say how it is reconcilable with justice, or how it is reconcilable with the duty which the jury had to perform in ascertaining what the party has suffered by the breach of his contract. It may be, that there may be some general rule, but how that general rule can be applicable to such cases it is difficult to understand.

We have not before us the course which has been adopted by some courts in this country, we have nothing to do but to look to the law of Scotland; and by the law of Scotland in the case which has been referred to of Watt *v.* Mitchell, no doubt is left as to what the rule of law in Scotland is. Lord Medwin

very laboriously considered that case, and goes through all the early authorities on the subject in Scotland, and after having done so draws this result from those early authorities in page 1163. He says "these are all the Scots cases referred to, and "I certainly deduce from them this, that our Court rejects the "plea of the Defenders, that the price at the time of the "delivery as the time when the breach of contract takes place, "should be the measure of the damages due where the De- "fenders has failed to implement." He, therefore, in terms on the authority of the many cases he refers to, ultimately lays down, that that is not the law of Scotland; that the law of Scotland is to look into all the circumstances that the law of Scotland is to do what was done here, to call upon the jury to exercise their judgment and sanction what is reimbursement to the party who has sustained loss by the original contract, and that without reference to what the price of the article at the particular time may produce.

My Lords, in what I have said I have wished to confine myself to the law of Scotland. I have not had an opportunity of saying anything on the subject of the law of England. I am contemplating now what I find to be the established law of Scotland, and the question is, whether in the face of that law, and in defiance of all the authorities referred to on the law of Scotland; and in the absence of any authorities in the law of Scotland raising a contrary proposition, your Lordships are to adopt a principle which would go to destroy that rule, and to lay down another, which, according to my opinion, is less calculated to do justice to all parties than the one upon which the Court has proceeded. It is very desirable no doubt that the law between the two countries should be assimilated; but that is no ground why your Lordships should introduce into the law of Scotland a rule, which if your Lordships were to introduce it would do great violence to the law of that part of the kingdom. My Lords, I think that the learned Judge most properly at the

trial, decided that he was not bound to put the question in the way the Defenders suggested, and that there was sufficient to lead him to the conclusion at which he arrived, that the jury were at liberty to look into all the circumstances for the purpose of measuring the damage.

My Lords, this exhausts the whole of the objections made, and my advice to your Lordships is to affirm the judgment of the Court.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed. And it is further Ordered, That the Appellants do pay or cause to be paid to the Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant, &c.

DUNLOP and HOPE—JAMES DODD, Agents.

[13*th March*, 1848.]

THOMAS GRAHAM, residing at Kennoway, in the County of Fife, *Appellant.*

GEORGE MACKAY, residing in the County of Sutherland, *Respondent.*

Small Debt Act.—Jurisdiction.—Review of sentences of the Sheriff under the Small Debt Act, 1 Vict., cap. 41, even upon the ground of want of jurisdiction because of non-residence within the Sheriffdom, is excluded, unless by appeal to the next Circuit Court of Justiciary.

BY the 30th section of the 1 Vict., cap. 41, it is enacted, "That no decree given by any Sheriff in any cause or "prosecution *decided under the authority of this Act*, shall be "subject to reduction, advocation, suspension, or appeal, or "any form of review or stay of execution, other than provided "by this Act, either on account of any omission, or irregula-"rity, or informality in the citation or proceedings, or on the "merits, or on any ground or reason whatever."

And by the 31st section it is also enacted, "That it "shall be competent to any person, conceiving himself aggrieved "by any decree given by any Sheriff, in any cause or pro-"secution *raised under the authority of this Act*, to bring the "case by appeal before the next Circuit Court of Justiciary: "Provided always that such appeal shall be competent only "when founded on the ground of corruption, or malice and "oppression on the part of the Sheriff; or on such deviation "in point of form from the statutory enactments as have pre-

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"vented substantial justice, or on incompetency, including "defect of jurisdiction in the Sheriff."

In the year 1844 the Appellant brought an action of reduction, in the Court of Session, of a decree for payment pronounced against him by the Sheriff of Sutherlandshire under the above statute, and of a decree of forthcoming upon arrestments used upon the dependence of the action in which the decree for payment had been pronounced. The chief ground upon which this action of reduction was rested, was an allegation that the Appellant was not resident in the county of Sutherland, and therefore the Sheriff had no jurisdiction to pronounce the decrees.

The Respondent denied the allegation of non-residence, and averred that the Sheriff had pronounced the decrees after hearing evidence upon the subject; and pleaded that the action was incompetent, as review of decrees under the statute, by the form of reduction, was excluded by the statute, and that it was further excluded by the Appellant having appeared in the action of forthcoming, and pleaded the want of jurisdiction, whereby he had prorogated the jurisdiction.

The Lord Ordinary (Ivory) on the 22nd November, 1844, repelled the defences, "so far as they impugned the competency "of the action on alleged *personalis exceptio* against the pursuer, "in bar of his proceeding therein," and added to his interlocutor the following note:—

"The Lord Ordinary would have been disposed to report "this case to the Court, in order that a question of such general "concernment in the construction of the Sheriff's Small Debt "Act might at once have been settled by an authoritative judg"ment. As both parties, however, concurred in asking a "deliverance on the case as it stands, he has not thought "himself entitled to refuse it.

"The question does not, as has generally been the case, turn "upon any point of mere nice technicality. It involves con-

" siderations of deep and substantial importance, and cannot be " decided without materially affecting the whole scope and " operation of the statute.

" Now, to the Lord Ordinary, it seems impossible to bring " the proceedings which are here submitted to challenge within " the protection of the statute. No doubt the words of its 30th " and 31st sections are very broad. But the Lord Ordinary " cannot think it was thereby meant to extend the powers which " the Sheriff is entitled to exercise, to a case where the party " has *no domicile within the county*, or to authorise the Sheriff, " under any circumstances, to pronounce sentence, or at all " exercise his judicial functions, in reference to persons '*without* " '*his territory.*' Unless it was so, however, this strikes at the " root of the whole matter, *Ersk.* 1, 2, 16. For otherwise the " cause was not one of which it can be said that it was either " 'raised' or 'decided *under authority of this Act.*' In this " view, after an anxious study of the whole authorities, the Lord " Ordinary cannot distinguish between the case now under " consideration, and that of Scott, 2nd July, 1832.

" It is said that the pursuer is barred by having appeared " before the Sheriff, from now maintaining that the latter had " no jurisdiction. But the decree originally pronounced against " the pursuer was a decree *in absence.* And unless *that* decree " can be maintained on its own strength as a competent and " valid proceeding, the whole superstructure subsequently " reared upon it must fall to the ground. Besides, even after- " wards, when the pursuer did appear, he did so, as seems to be " admitted, only to plead the want of jurisdiction, and the " offering of a declinature, is so far from importing an acquies- " cence in the Judge's jurisdiction, that it is an express dis- " owning of it.—*Ersk.*, 1, 2, 27.

" Perhaps the strongest consideration that can be offered in " support of the defender's plea is, that the Sheriff must neces- " sarily have jurisdiction to dispose of all such cases of *decli-*

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"*nature*, and that his judgment on such a question ought "therefore to be as conclusively final under the statute, as "his judgment on the merits. But the Lord Ordinary can- "not hold that the Sheriff could thus be supported in any "undue and usurped extension of his jurisdiction, beyond his "proper territory. It would lead to the most extraordinary "conflict between the courts of different counties. And then, "in such circumstances as here occur, just suppose that the "summons before the Sheriff had, *on the face of it*, described the "party *residing in Fifeshire*,—could it have been maintained for "a moment that the proceeding was entitled to protection; on "the contrary, the Sheriff could not have sustained his juris- "diction in such a case, without doing violence not only to the "spirit and intendment of the statute, but to every fundamental "principle of the law of jurisdiction. But it comes to the same "thing in principle if *the fact* truly was, and shall be established "to have been, that the party had (as he alleges) possessed no "actual residence or domicile within the county for a number "of years. And the pursuer's allegation to this effect being "relevant, it must meanwhile be held *pro veritate*, in the "question of competency.

"The Lord Ordinary is not moved by the late case of "Rankine, 7th December, 1843. The objection is not here to "mere 'omission, or irregularity, or informality in the citation,' "&c., or even to 'defect of jurisdiction,' as arising out of "these or out of any other such like grounds. It rests "on a total and absolute nullity out and out of everything "that took place when put forward in the light of a proper "judicial proceeding. The Sheriff, in truth, was not, in the "sense of the statute, entitled to the character of Judge at "all. His court was not *forum competens*. The cause was not "a cause within 'the authority of the statute.' The whole "proceedings were *coram non judice*, and so were void *ab initio*,

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" just as much as if they had occurred before a party not holding " the judicial character.

" As to the remedy of appeal to the Court of Justiciary, the " Lord Ordinary does not think that in such circumstances it " was incumbent on the pursuer to resort to it. Sim, 24th " February, 1831. And moreover, that remedy does not seem " by the statute to be *exclusive* of the party's other common " law remedies;—the case, in this respect, falling to be decided " on the strength of section 30, which contains the only enact- " ment to be found in the statute that is truly *exclusive of* " *review.* Now, 1st, That section excludes review only where " the decree has been given in a 'cause or prosecution decided " '*under authority of this Act.*' 2nd, The words in which it so " excludes review are nowise broader than those which formerly " occurred in 10 Geo. IV., c. 51, sec. 18, unless in so far as (to " meet such cases as Brown, 16th February, 1833; Wallace, 3rd " July, 1835; Maclaren, 12th December, 1835; and M'Ewan, " 9th March, 1838,) they include irregularity or informality 'in " 'the *citation*,' as well as in the 'proceedings.' 3rd. Neither do " they, any more than those of the corresponding enactments in " 10 Geo. IV. (for words 'any ground or reason whatever' " occur in both acts,) *exclude review* on '*incompetency or defect* " '*of jurisdiction*,' at least not otherwise than as these grounds " of review may have originated in mere omission, irregularity, " or informality. And, 4th, Any implication to be drawn even " from sec. 31, as regards the allowance of appeal to the Justi- " ciary may reasonably be met, and the expression of the " statute be satisfied rather by construing the 'incompetency " 'and defect of jurisdiction' there mentioned as going no " farther than those causes of incompetency, &c. pointed at in " the precedent *excluding* clause, (or perhaps its reference to " such jurisdiction as if created under sec. 26,) than by extend- " ing them so as to violate all principle by letting in the Sheriff

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"to proceed against parties not subjected to his jurisdiction at "all under the statute, and wholly beyond his territory. Indeed, "it might very well so happen that a party resident beyond the "Sheriff's jurisdiction,—perhaps in a foreign country,—should "never hear of the decree taken out against him until long "after all power either of obtaining a rehearing before the "Sheriff, or of submitting the Sheriff's judgment to review by "way of appeal, had been lost by lapse of the statutory period "allowed for the purpose."

The Court, upon a reclaiming note for the Respondent, (on the 22nd February, 1845,) "altered the interlocutor of the "Lord Ordinary, found that the only competent Court of "appeal in the case was the Circuit Court of Justiciary, and "dismissed the action."

The appeal was heard *ex parte*, the Respondent having neither lodged a printed case nor appeared by counsel.

Mr. Anderson for the Appellant enlarged upon the grounds for the appeal which appear in the note of the Lord Ordinary, and cited in support of his argument, Scott *v.* Anderson, 4 *Bell's Ap. Ca.* 197; Wallace *v.* Hume, 13 *S. & D.* 1034; Campbell *v.* Young, 13 *S. & D.* 535; Brown *v.* Richmond and Co., 11 *S. & D.* 407; and Campbell *v.* Brown, 3 *Wil. & Sh.* 441.

LORD CHANCELLOR.—My Lords, it appears to me that there is nothing at all in this question. It turns entirely upon the construction of the 30th and 31st sections of the statute, and no cases which have been decided under other Acts, not containing those provisions, or provisions in terms very similar, have any application or afford any ground for the proceeding on the present occasion.

The question is, whether the Sheriff's decree, the party being out of the jurisdiction of his Court, was a subject for reduction in the Court of Session. It seems to me that these

two clauses have been framed expressly for the purpose of excluding reduction, it having before been found to be inconvenient. The preamble of the Act recites that "experience has "pointed out certain alterations which ought to be made." There was in the former Act a clause similar to the 30th, but none similar to the 31st, and parties were held entitled to come to the Court of Session.

Now the Legislature, in the 31st clause, says, "That it shall "be competent to any person conceiving himself aggrieved by "any decree given by any Sheriff in any cause or prosecution "raised under the authority of this Act, to bring the case, by "appeal, before the next Circuit Court of Justiciary, or where "there are no Circuit Courts to the High Court of Justiciary." Then certain grounds of appeal are enumerated, and, amongst others, is "incompetency, including defect of jurisdiction of the "Sheriff." So that if the objection be that the Sheriff has exceeded his jurisdiction (which is not controverted here and is beyond all question), the Court of Justiciary has the jurisdiction by way of appeal, and in this section that is called a proceeding "under the authority of this Act," that is, the Sheriff having no jurisdiction but assuming jurisdiction, if he err in the question brought before him the appeal is to the Court of Justiciary. Upon that there is no question.

Then the 30th clause says, "That no decree given by any "Sheriff in any cause or prosecution decided under the authority "of this Act shall be subject to reduction," and so on, "other "than provided by this Act, either on account of any omission "or irregularity, or informality in the citation or proceeding, or "on the merits, or on any ground or reason whatever."

The words "under the authority of this Act," which are the words used in the 31st section, have a clear and ascertained meaning, about which no doubt can be entertained. If they have the same meaning in the 30th section the Court of Session is deprived of the jurisdiction, and it is given to the Court of

Justiciary. That is the whole question to be decided. The Court of Session have decided, by a majority, that they have lost their jurisdiction in this case by this provision, and I am clearly of opinion that they were right in that conclusion.

LORD CAMPBELL.—My Lords, with very great and sincere respect for the Lord Ordinary and Lord Mackenzie, I must say I think this is the clearest case I have ever seen, and I do not apprehend that any reasonable doubt can be entertained.

What is the meaning of the words "under the authority of "this Act" in the 30th section? Why that is explained by the 31st section. It seems to me to be quite clear that, under the 31st section, this would be a matter of appeal to the Court of Justiciary. The jurisdiction of the Court of Session is taken away in the most express terms, because, it is said, that the only mode of questioning what shall be done is by the appeal which is given under the 31st section. Then, under the 31st section, although the objection may be want of jurisdiction, it is considered a proceeding "under the Act." That reflects clearly the meaning that the Legislature intended to fix to the 30th section; and that meaning being fixed to the 30th section, the jurisdiction of the Court of Session is taken away in the most express terms.

My Lords, it appears to me that the decision in this case ought to be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed.

DEANS, DUNLOP, and HOPE, Agents.

[17*th March*, 1848.]

MRS. A. TURNBULL and Others, Trustees of WILLIAM TURNBULL, ESQ., deceased, *Appellants.*

JOHN COWAN, ESQ., Advocate, Curator Bonis of THOMAS TURNBULL, ESQ., *Respondent.*

Intestacy.—Accessorium sequitur principale.—Where real and personal estate are given to Trustees, with a direction to invest the personal estate in the purchase of lands, and upon the happening of a contingency to entail both the lands given and those to be purchased, upon a specified series of heirs, without any direction as to the application of the rents of either set of lands, until the occurrence of the contingency, these rents will not fall under the direction to invest and entail; but will go to the heir as undisposed of.

Heir at Law.—Minor.—Lunatic.—Curator bonis.—Election.—Whether a minor or lunatic should, before majority or convalescence, elect by his curator between his rights at law and his interests under a will, is completely within the power of the Court, and will be exercised for him by the Court, only where it is absolutely necessary, with a view to the interests of other persons.

Truster's debts.—Where, between the time for investment of personalty in the purchase of land, and for entailing the land, on the occurrence of an uncertain contingency, there are rents undisposed of, these rents will not form the primary fund for payment of the Testator's debts; They will be payable out of the *corpus* of the personalty before investment.

Legitim.—Intestacy.—Heir ab intestato.—A lunatic heir entitled, on the occurrence of a contingency, to certain benefits under the will of his ancestor, is entitled in the meanwhile, to the undisposed estate of his ancestor, without prejudice to his right to elect, when the contingency should arise, between his *legitim* and the benefits given by the will.

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WILLIAM TURNBULL by trust disposition and settlement of the 2nd February, 1826, conveyed to trustees "All and "sundry lands, teinds, fishings, superiorities, adjudications, "annual rents, and other heritages whatsoever, presently be- "longing, or which shall happen to belong to me at my decease, "with the whole writs and evidents, rights, title-deeds, and "securities thereof: As also all and sundry debts and sums of "money, real and personal stock in 3 per cent. Government "annuities, or in any other Government security, stock in the "Bank of England, or in any other bank, corporation, or com- "pany: Also all money due on bill, note, account, decreet, or "any other manner of way: Also all household furniture and "effects, farm-stocking and produce, utensils of every kind, "lying money, arrears of rent, interest, dividends, and, in gene- "ral, all personal property of every description, which shall or "may belong to me at death, with the whole vouchers and "instructions thereof." (Then followed an enumeration of the particular lands.) "With full power to my said trustees, imme- "diately after my decease, to enter to possession of the premises, "*to* output and input tenants, and to manage the same in the "*like* ample manner as I could have done myself, and particu- "*larly* to liquidate and realise my whole personal property, and, "*as* soon as conveniently they can thereafter, to invest the "proceeds in land, as near to my other properties as can be got, "and thereafter to hold and entail the same in manner under- "written: First, my said trustees are to pay all my just and "lawful debts, deathbed and funeral expenses, and the expense "of executing this trust: Secondly, they are to pay to my said "wife, Mrs Alison Turnbull, in the event of her surviving me, "during all the days of her lifetime, and remaining my widow, "a free yearly annuity of 500*l.* per annum." (Then followed gifts of certain annuities and legacies.) "And, third and lastly, "I hereby direct and appoint my said trustees to apply such

" part and portion of the income of my residuary estate as they " shall see useful and proper for the support and comfort of my " only child, Thomas Turnbull, during all the days of his life- " time; and, in the event of his recovery or death, then my said " trustees are hereby directed to execute a strict entail, accord- " ing to the law of Scotland, of my whole lands and heritages, " as well as of such lands as may be purchased and acquired with " my personal property, so directed to be invested as aforesaid, " and that to and in favour of the said Thomas Turnbull, my " son, if it shall please God to restore him to health, and to the " heirs whatsoever of his body—whom failing, to the said Wil- " liam Turnbull, son of my said brother deceased, and the heirs " whatsoever of his body—whom failing, to my own nearest " heirs whatsoever, the eldest heir-female always succeeding " without division, and excluding heiresses-portioners through- " out the whole course of snccession: And further, I hereby " nominate and appoint my said trustees to be my executors " and universal intromitters with my personal means and estate, " in trust as aforesaid, with power to give up inventories thereof, " and confirm as effeirs."

The maker of this deed died in the month of December, 1840, leaving his only son mentioned in it, surviving him. At the date of the deed, and likewise of the truster's death, this son was in an imbecile state of mind, and in March, 1842, the Respondent was appointed *Curator bonis* to him.

The fortune left by the truster, to be regulated by the trust disposition, consisted of lands, worth about 1500*l.* a-year, and personal estate, chiefly Government stock, amounting to upwards of 80,000*l.* in value,

The trustees having accepted the trust, and entered into possession of the trust estate, the Respondent on behalf of his ward, brought an action against them and the persons in whose favour an entail was by the trust disposition directed to be made, concluding to have it found, that it was not incumbent on the

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Respondent to elect between the *legitim* of his ward out of the personal estate of the truster, and the benefits given to him by the trust deed; and that his ward, in the event of his recovery, and his representatives in the event of his death before recovery, would be entitled to make such election notwithstanding he should have received from the trustees out of the income of the estate sufficient for his ward's maintenance. That the trustees were not entitled to make an entail of the lands, left by the truster, and to be purchased by them, until his ward should have recovered; and that the income of the general estate between the death of the truster and such period was undisposed of and belonged to his ward absolutely "without prejudice to "the right of the said Thomas Turnbull, or of his legal repre- "sentatives, afterwards to exercise the said right of election, or "to claim *legitim*, as before mentioned; and that the same shall "so belong to the said Thomas Turnbull, and form part of his "funds, whether effect shall ultimately so be given either to the "said legal right of *legitim*, or to the foresaid testamentary "provision in his favour under his father's said deeds of "settlement."

The Lord Ordinary made avizandum to the Inner House, and directed cases for the parties to be prepared and boxed for that purpose.

Upon the 13th June, 1845, the Court pronounced the following interlocutor, which was the one appealed from: "find, "decern, and declare in terms of the first declaratory conclusion "of the summons; and, further find and declare that the "Defenders, the trustees of the late William Turnbull, are not "directed or entitled under the terms of his trust settlement to "execute an entail of the lands conveyed to them by that deed, "or of the lands to be purchased by them under the directions "thereof, until the period of the recovery or death of Thomas "Turnbull his son; and that the free income and annual produce "drawn and to be drawn from the estate heritable and move-

"able estate of the said William Turnbull by the said Defenders, "his trustees between the period of his death and that of the "execution of such entail, whether the same was acquired by "him in his lifetime, or has been, or shall be acquired by the "said trustees, under the direction of the said trust deed, after "deduction of all payments which the trustees shall, in con- "formity with the direction and authority in the said trust deed, "make out of the said income and annual produce, including "such allowance as they shall make for the support and comfort "of the said Thomas Turnbull, during all the days of his life- "time, or until his recovery, is undisposed of by the said deed, "and now belongs, or as the same shall from time to time exist "and become due, will belong, to the said Thomas Turnbull "absolutely and unconditionally as his own funds; and that "the pursuer as his *curator bonis* is entitled to demand and "recover the same without prejudice to the right of the said "Thomas Turnbull, or of his legal representatives afterwards to "exercise his right of election, or to claim *legitim* as concluded "for in the first declaratory conclusion of the summons; and "that the same shall so belong to the said Thomas Turnbull, "and form part of his funds, whether effect shall ultimately be "given either to the said legal right of *legitim* or to the testa- "mentary provision in his favour under his father's said deeds "of settlement."

Mr. Stuart and *Mr. Anderson* for the Appellant.—I. Although it be very true that the curator of a lunatic or minor cannot change the character of the estate to which his ward has succeeded, as by converting personal into real estate by lending money upon heritable bond, and, in this way, affect the succession to the ward's estate, as between his heir and personal representatives, there is nothing to prevent the curator of a ward, to whom one of two rights belongs, to elect between the two. Until the election is made the ward has not succeeded;

the nature of the estate to which his heir or representatives will be entitled, in the event of his death, has not, till then, been ascertained; so that the election cannot, in any way, alter its nature. The voluntary act of a curator in changing the character of his ward's estate is altogether different from his election between two estates, rendered necessary by the existence of interests in others. And, if the officer has not this right inherent in the office, there can be no doubt the courts have power to give it to him, where the circumstances make this necessary. In England there are many examples of this course being taken, Chetwynd *v.* Fleetwood, 1 *Bro. Par. Ca.* 300; Ebrington *v.* Ebrington, 5 *Macl.* 117; Hume *v.* Randall, 2 *Sim. & St.* 187; Bigland *v.* Huddleston, 3 *Bro. Ch. Ca.* 285; Wilson *v.* Townsend, 2 *Ves. Sen.* 696. And in Scotland, whenever the Court has been satisfied that the particular power asked by a curator for the management of his ward's estate was necessary, either to prevent loss, or to procure evident advantage, or to save the interests of third parties, it has been in use to grant it. *Re* Miller, 15 *Sh. & D.* 147; Tutors of Lord Cardross, 16 *Sh. & D.* 238; Somerville's Factor, 14 *S. & D.* 451. If the power exists the reasons are obvious, why, in the present instance, it should be exercised. Unless election is made the trustees cannot know how to proceed in the administration of the trust, for if the ward is to have *legitim* they should invest in land only two-thirds of the personal estate; whereas they should invest the whole if he is to take the benefit of the trust deed. Until this is ascertained, which may not be for many years, if the curator is not presently to elect, the execution of the trust is practically suspended, and the rights of those to take under the entail possibly materially affected, by risk to the fund while uninvested, the loss of opportunity for profitable investment; and the postponement of enjoyment, which, in the case of election to take *legitim*, would become immediate. And if the ward is to be entitled to the rents as unappropriated, the injury to the other parties by

the day of election, is rendered more obvious, for this delay is what will create these surplus rents, which, if *legitim* were presently elected, could not have existence.

II. With regard to the surplus rents between the period of the testator's death and the period for making the entail, which will remain after providing for the ward's maintenance, the gift to the trustees is of the whole estate, real as well as personal. There is no intestacy as to any part. The trust, therefore, must be commensurate with the gift; and these rents, coming within the gift, must be invested as the rest of the estate is directed to be invested. A direction to invest the *corpus* of an estate embraces a direction to invest the fruits of the *corpus*. In Gillespie *v.* Marshall, *Mor. No.* 2, *App. accessorium, &c.*, a gift of capital to be paid at twenty-five, without any direction as to the interest in the meanwhile, was held to carry the interest, accumulated with the principal, as an accessory to it. In Graham *v.* Templar, 3 *Wil. & Sh.* 48, although there was a gift of the accruing rents, the opinion of the Judges, was, that without this they would have been carried; for in the words of one of them, " when an estate is conveyed to trustees, for behoof of another, " the conveyance carries the whole rents, casualties, &c., in the " same manner as the estate itself." The rents are but accessories to the estate itself, and follow it according to the maxim *accessorium sequitur principale*. The authorities in England are much to the same effect: in Gibson *v.* Montford, 1 *Ves. Sen.* 485, Lord Hardwicke reiterated, as an acknowledged doctrine, that an executory devise of the residue of real and personal estate, took in the intermediate profits of the estate devised; and in Ackers *v.* Phipps, 9 *Bli. N. S.* 440, a case which very much resembled the present, where there was a devise of real estate, and a bequest of personal estate, to trustees, to be conveyed by them to the object of the trust, at twenty-four years of age, it was held that the rents, accruing till the period of making over the estate, did not go to the heir-at-law of the truster as a

resulting trust, although there was an express direction for accumulation of the income of the *personal* estate, while the will was silent as to the income of the *real* estate, which suggested, as a fair inference, that accumulation as to them was not intended.

In the present case the whole estate of the truster is given "for the uses, ends, and purposes after specified;" everything, therefore, which the deed passed is directed to be applied to the purposes of the trust. But the investment in land is not fixed at any time; it is to be made "as soon as conveniently may "be," whence it necessarily follows that some period, in contemplation of the truster, was to elapse between his death and the investment. If the expressions of the deed are large enough to carry the rents of the lands left by the truster, and the interest of the money to be invested as a part of a whole, this part must, as a necessary inference, be devoted to the same trusts as the land itself, and the capital of the money.

III. Assuming that the income, until the period of entail, is undisposed of, and that the Respondent is entitled to elect between *legitim* and the provisions of the trust, as the general intent of the truster was that the beneficiaries under the trust, should enjoy the whole estate, including that part of it which would consist of the *legitim*, in order to give effect to this general intent, which, according to the doctrine laid down in Stair *v.* Stair, 2 *Wil. & Sh.* 414, must first be given effect to; the Court would, in case the Respondent elected to take his *legitim*, be constrained to apply the undisposed-of income to answering the *legitim*, for to take it out of the capital of the estate would be to defeat, so far, the general intent of the trust.

But further, if the Respondent take the income as undisposed of, he must do so under a passive title of representation to make good the obligations of the truster, and, among the rest, to fulfil his disposition of the fund of *legitim*. If, therefore, the Respondent were to take the undisposed-of income the

trustees would be entitled, when he came to demand his *legitim*, to set off against it what he had so taken, and the difference between the two would be all he would be entitled to receive.

IV. Moreover, construing the deed, so as best to effectuate the purposes of the truster, his debts, legacies, and annuities, and the expenses of the trust, must be deducted out of the undisposed-of income, which, whether it is to be invested in land or not, is, at all events, given to the trustees for the purposes of the trust.

Mr. Bethel, *Mr. Wortley*, and *Mr Gowan* for the Respondents.

LORD CHANCELLOR.—My Lords, In this case several questions arise, and the most important is that which relates to the income arising from the property real and personal, intermediately between the time of the testator's death and the period at which the entail, according to the directions of the instrument, was to be carried into effect.

The question depends upon what appears to be the intention of the testator. In fact, all questions upon instruments of this sort, but peculiarly questions as to what must become of the intermediate income of the property in such a case, depend upon the will of the party who is the author of the instrument. If he has directed the manner in which those intermediate rents or interest are to be applied of course that direction must prevail. If he has not so directed, and there is no disposition, then it is equally clear that with respect to that part of the property belonging to him at the time of his death of which he has so made no disposition the rule of law must prevail, which applies, in the absence of any direction by the party entitled to prescribe the mode in which it is to be taken.

The terms of the gift, so far as they are necessary for the consideration of this question, are thus expressed. He gives

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all his lands "presently belonging, or which shall happen to "belong to me at my decease;" he then gives his household furniture, enumerating several descriptions of property, "and "in general all personal property of every description which "shall or may belong to me at my death." Then he vests the property in trustees, and he directs them to convert the personalty into money, and to invest the proceeds in land;—then he directs the payment of his debts, and gives annuities to his wife and to several other persons. And then his only child, being unfortunately deficient in intellect and incapable of enjoying the property, he directs the appointment of trustees "to apply such "part and portion of the income of my residuary estate as they "shall see useful and proper for the support and comfort of my "only child, Thomas Turnbull, during all the days of his life-"time, and, in the event of his recovery or death, then my said "trustees are hereby directed to execute a strict entail according "to the law of Scotland of my whole lands and heritages, as "well as of such lands as may be purchased and acquired with "my personal property so directed to be invested as aforesaid, "and that to and in favour of the said Thomas Turnbull, my "son, if it should please God to restore him to health and to "the heirs whatsoever of his body, whom failing," then to certain other parties in succession.

He gives therefore all the lands of which he might be possessed at the time of his death; and he gives his property as it existed at the time of his death, not as an executory gift—not a gift to take place at a future time,—but an immediate gift to trustees, who are immediately ordered upon the property so vesting in them, after the payments directed to be made, to invest it in the purchase of lands; and the lands when so purchased are to go with the lands which he had himself the possession and the disposition of at the time of his death, and those lands which so belonged to him and the other lands so to be purchased with the residue of his personalty, are to be

entailed. But they are to be entailed only upon certain contingencies or certain events. They are to be entailed if the son recovers his health; and if he does not recover his health, then they are not to be entailed at all until the period of his son's death.

Two events therefore are pointed out, upon the happening of either of which the entail is to take place; and then, and not till then, are the trustees to denude themselves of their trust and to hand over the property to those who would be entitled under the entail so directed to be made. But till one of those two events arrives the trustees have nothing to do but to hold the land according to the directions of the will. And we in vain look in any part of the will to find any direction as to what they are to do with the income arising from the land so directed to be purchased, in the interval between the death of the author of the trust and the period at which the trustees, under this direction, are to create an entail. I am speaking of course of the surplus, not of that portion which is directed to be applied either to the payment of the annuity to the wife or to the maintenance of the child. The question is only as to the surplus which remains after those particular purposes are provided for.

My Lords, several cases have been cited, and doctrines have been referred to of unquestionable authority, and authority not only in point of principle but in point of decision, which cannot be controverted, but which appear to me to have no application whatever to the present case;—for instance, the case of Fitzgerald *v.* Fitzgerald, and the case of Sitwell *v.* Barnard. Those cases are both governed by a principle totally inapplicable to the present case. The decision in Sitwell *v.* Barnard, (and there are other cases which follow upon the same principle,) is simply this:—that where a testator does not leave property undisposed of, but does dispose of the intermediate rents and profits, and directs an accumulation until the money be invested in land, a year is a fit time to allow that to be done. There is

this difficulty, that you cannot always invest money in land; it may take some time to ascertain what the surplus is, and when you have got the money you cannot always find an estate fit to appropriate a sum of money to. Then the testator having directed that, until the investment shall be made, there shall be an accumulation, the question comes, if you cannot immediately invest, what is to become of the tenant for life's provision until the trustees sell the property, execute their trust, and find land in which the money can be properly invested. There is an established rule in the cases referred to, that a year is a reasonable time to allow to trustees to perform their trust (a rule applicable in other cases), and that after a year has elapsed, which is a fair time to enable them to perform their duty, then the tenant for life shall be entitled to the income of the property, if not invested, as he would be entitled to the income if the investment had taken place. There is no absence in that case of any disposition on the part of the testator or the author of the trust; on the contrary, it is a dealing by the Court of Equity with the direction of the will, or the legal construction to be put upon it; not an applicalion of an income unappropriated by the testator, but a controlling of the direction which is to be found on the face of the will.

Another class of cases is Fitzgerald *v.* Fitzgerald, and other cases which have followed upon the same principle. Those cases are equally inapplicable to the present; they turn entirely upon this rule of equity in this country, that where a residue is given upon a future contingency, the intermediate income goes with the principal, but that where land is given upon a future event the intermediate rents do not go, and for this most obvious of all reasons, which seems to have been lost sight of at the bar very much: a gift of land is a gift of a specific thing, and if that is only to commence at a future period there is nothing in a gift of land the interest in which is to commence *de futuro*, to show an intention to give the intermediate interest, and

therefore it descends to the heir. But where you give the residue of personality, then, from the comprehensive nature of the term "residue," the Court says, it is quite immaterial that the intermediate interests are not given; they are not given in terms as intermediate interests, but they are given under the term "residue," and therefore a gift of the residue of personalty *de futuro* carries with it all the intermediate income. But the gift of a specific sum of money does not, unless there is something showing an intention to give an intermediate interest in the meantime.

Then the Court has this to consider. Here is a joint mixed gift of personalty and realty. One rule applies to personalty and another rule applies to realty. The term "residue" is used as to both. It is not, strictly speaking, applicable in the same sense to realty in which it is applied to personalty, because, although you talk of the residue of land, and a gift of land as a specific gift, still a rule having been adopted with regard to personalty, it has been considered that where the gift is mixed, that is an indication of intention that the same rule shall prevail when applied to realty. But that rule has no application to the present case, unless it can be shown that with regard to the personalty, in this case, at all events, the intermediate income fell into the *corpus* of the fund to be invested in land. In all those cases there is no intermediate gift at all. The gift is *de futuro*. Here is an intermediate and direct trust to be executed by the trustees, which distinguishes it from the various other cases which have been referred to, which, to my great surprise, was used in argument as reason why the intermediate rents should pass.

Now, my Lords, if it rested entirely upon that the case of Bullock *v.* Stone, which was referred to in the argument, expressly takes that distinction, and decides that it makes no difference whatever generally speaking, whether there be an intermediate trust or not, except this, which Lord Hardwicke

observed, that the question does not arise as to the legal interest in the land appropriated; but if it be in trust, then what descends to the heir is an equitable interest to be handed over to the party entitled by the trustees, instead of being a legal right to receive the rents in the first instance.

But it is very important in looking at the intention of the author of the trust, to see what he has directed to be done upon his own death. Now, to be sure, a gift of personalty is not materially varied in extent by the party describing it as personalty which he had upon his death; but when you are looking at the intention, and to see what it is that he meant to have done with his personalty, it is an indication of his intention as to the course to be adopted with the property upon his death. He in terms gives the personalty, and he directs the gift to be invested in land, as soon as conveniently may be, after his death. There is no doubt, therefore, that it is the duty of the trustees, after taking a reasonable time to convert the property into money, to invest the money in the purchase of land. Now, according to the rule of equity, which applies to Scotland as well as to this country, what he has directed to be done at the time of his death, must be considered as being done; and if it is postponed by any accidental circumstances, although it may make a difference to the parties, whether it is received in the shape of interest, or in the shape of rent, yet their right must be the same. It is not a postponement by the trustees of the execution of the trust, that can possibly take the property from one party entitled to it, and give it to other parties not entitled to it. We must therefore suppose that the testator supposed that what he directed to be done would be done.

Now, in this trust, therefore, if the money when realized had been invested as soon as conveniently could be after the death of the author of the trust in the purchase of land, what is to become of the rents of that land in the intermediate period between his death and the time fixed for the settlement? I

asked that question of the learned Counsel at the Bar, and of necessity they said that the rents as they accrued, must be invested *de anno in annum* in the purchase of other lands. In what part of the will do you find any such direction? Where do you find any intimation of it?—Quite the reverse.—What is to be invested in land is not what may so accrue as the income of the property *de anno in annum;* but in terms the author of the trust has said that the personalty shall be invested as it existed at the time of his death; therefore, whether it includes the rents of the property in land which he had himself at the time of his death, or whether you look to the land which he directed to be purchased with his personalty as soon as conveniently could be after his decease, there is an absence of all provision in the will as to what is to become of the intermediate rents, after discharging those payments which he has directed to be made by the deed. Therefore it appears to me that this is precisely a case in which there is an absence of all disposition of the intermediate property, which, therefore, must devolve upon the son. And without at all entering into the question whether the intermediate income arises from the personalty when invested in land, or whether the intermediate income arises from the interest of the personalty whilst existing in that form, it would necessarily fall to him as heir, in one character or the other; as he is representing both, it would necessarily fall to him, there being no gift from him and he taking it by law.

My Lords, having expressed the opinion which I have formed upon the principal part of the case; there are two other points which I must shortly notice. It was contended that the debts which the testator has directed to be paid, are to be paid out of the income which shall arise after his death. I in vain endeavoured to ascertain upon what principle it was that that was contended for, inasmuch as though the property is property which he had power to dispose of beyond all doubt by his will, yet not having disposed of it, it is property which descended to

the heir. I presume that the argument was intended to be founded upon the rule that property which has descended is first applicable to the payment of debts. But that will not answer the purpose of the argument, because this is not property which has descended,—it is the income arising from property disposed of.

Therefore they must go still further and show, not only that property which has descended is first applicable to the payment of debts in such cases, but that the debts are to be paid, not out of the *corpus* of the estate, but out of the income undisposed of, or out of a portion of the estate, with respect to which no intention has been declared. There can be no authority for such a proposition. And, if there were any doubt about it, the author of the trust has here directed the payment of the debts by the trustees out of the property which he has disposed of by his will. I apprehend, therefore, there is no doubt whatever that the debts are to be paid out of the *corpus* of the estate. Nobody can say that the creditors are not to be paid till a sufficient sum is realised, by the accumulation of the annual income of the estate. They are to be paid out of the *corpus*. And the heir is not bound, out of that which has fallen to him as a future income, to provide a fund for the payment of those debts.

Then, my Lords, comes the question of election. Now all that has been done with regard to election has been to postpone the period at which the election shall take place. If I am right, and your Lordships adopt the proposition which I mean to submit to you, to affirm the decree, so far as it declares that the intermediate rents and profits are undisposed of, and therefore fall to the estate of the lunatic, your Lordships observe that there is nobody who can be interested in having the question of election decided now, because, then, the whole income arising from the estate belongs to the lunatic. Whether he takes it as the interest of his *legitim*, or whether he takes it as falling to him as heir, the intermediate interest is that which nobody else

can touch until the period comes when the entail is to be created.

But there is another reason which makes it extremely inconvenient, and it is an inconvenience which the Court would not expose the party to, except in a case of absolute necessity, namely, that there is no means at this moment of forming an opinion about the election. There is no means of ascertaining what the interest of the lunatic would be, because it must depend entirely upon the probability of his recovery. Now if the interest of other parties was very much affected by the postponement, I will not take upon myself to say what course might be proper to be adopted for the purpose of relieving other parties from the inconvenience arising from the postponement of the election. But we know perfectly well, in this country at least, (and there is no reason to suppose that it is not the same in Scotland), that the question of election is very much in the control of the Court, and that it either postpones it or directs the election to take place immediately, according to the circumstances of the case. It is so frequently with regard to infants. If the interests of other persons are very much affected, and require an immediate election, the Court takes upon itself to perform that duty by considering what is the most expedient course to be adopted for the interest of the infant. On the other hand, if it appears that there is no inconvenience from the delay, the Court then postpones it till the party is in a situation to choose for himself.

Now here no inconvenience can arise to anybody else from postponing the period of election, as the election will be between the legitim and the interest which the lunatic would take under the entail, and which, in the event of his not recovering, would leave nothing to choose between; because then of course the legitim would be the better interest for him, inasmuch as in that case he would take nothing under the entail. It would be putting his interest in a most inconvenient position, and assum-

ing a duty which it would be impossible to execute with anything like certainty, if the Court should take upon itself to choose for the lunatic, even if it has the power of so doing, as to whether it would be more expedient for him to take the actual legitim which he is clearly entitled to, or to take the chance of the benefit from the entail, which is very uncertain, and which, from the nature of his malady, it is very unlikely that he should ever derive any benefit from.

My Lords, there was considerable confusion, as it struck me, in the argument upon this question of election. It seemed to be supposed that the interest which the party took as heir, or as next of kin, was in some way or other to be a question of election. Nothing can be more unfounded. The question of election turns upon this,—where a party gives to an individual something which is his own, and attempts to give to somebody else away from that party something which does actually belong to the person to whom the first gift is made, then the party cannot both take under the instrument and against the instrument —he cannot both claim that which is his own and take that which is intended to be given to him. But the heir-at-law is not in that position. He claims nothing against the will. He claims that which is his own by the law of descent. The legitim the party has an antecedent right to. Supposing, for instance, the personal property is given to the heir-at-law, and the real estate is attempted to be given by a will not properly executed, the heir-at-law takes the land as the heir, but he is not deprived of any benefit given under the will; unless indeed the testator has imposed the condition of election (which no doubt he may do), the question of election will not arise at all. The election therefore clearly would be ultimately between the benefit taken under the entail and the title to legitim as a claim against the gift, because the gift has professed to give all which the author of the gift had at the time of his own death.

My Lords, I therefore see no inconvenience at all in the

course which the Court of Session has adopted, of deferring the period of election at present. And I think they are also right in principle in declaring that the intermediate income arising from the property is undisposed of by the will. It is to be observed, with regard to the postponement of the election, that at the commencement of this process it appears that the parties all concurred in the propriety of that arrangement, but that they changed their minds, and thought that it would be expedient to get the election at the present moment. But all the parties at the commencement (and it is so assumed by the first interlocutor of the Lord Ordinary), concurred in the opinion, that it would be convenient and proper, under present circumstances, to postpone the question of election.

My Lords, I think therefore, upon all these points, that the Court of Session have come to the right conclusion; and I move your Lordships to affirm their interlocutor.

LORD CAMPBELL.—My Lords, I have very little to add to what has been addressed to your Lordships by my noble and learned friend. The first point which was discussed by the Judges below, and which has been debated at the Bar, is with respect to the election, namely, whether it was necessary for the *Curator bonis*, who is the Pursuer in this case, to elect between the will and the right to legitim, before making this claim. Now, my Lords, I by no means say that in no case the *Curator bonis* may not, under the direction of the Court, exercise the right of election. The *Curator bonis* appears to have considerably more authority by the law of Scotland than the committee of the estate of a lunatic has in England. He may sue in respect of the property of the person whom he represents, whether *compos* or *non compos*. And if his interest and the interest of third persons should require that an election be exercised, as at present advised, I should think that that might be done. But I see no convenience, but on the contrary, great

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inconvenience, which would arise from compelling the *Curator bonis* here to make an election, before claiming the surplus of the rents and profits of the real and personal estate that may arise between the death of the testator and the contingency contemplated, which is, the recovery of the lunatic or his death, when the lands are to be entailed.

Now, my Lords, the first consideration is, that the claim made in this action is not under the will at all. The claim made in this action is made on behalf of the lunatic (as I will call him, though he is not *cognosced*), for something which he takes not under the will, but which is undisposed of by the will, and which he would either take as heir-at-law or next of kin, either as the real property descending, or what in Scotland is called the executry or the personal estate. Then in this case he is not approbating or reprobating. He is not setting up the will. He is saying that there is something which, as heir-at-law and next of kin, he is entitled to. And that therefore, is not at all a case in which he is claiming something under the will, and at the same time rejecting the bequests or devises which the will may make.

Then there is certainly no inconvenience to the interests of the lunatic arising from the postponement, but quite the contrary. There is no inconvenience arising to the interests of third persons from the postponement, for no legatee and no creditor can be injured by the postponement, until either the recovery or the death of the lunatic.

Under these circumstances, it seems to me that the Court of Session were quite right in deciding that this question respecting the right to the surplus between the death of the testator and the recovery or death of the lunatic, may be determined without the election being declared upon.

Then, my Lords, with respect to the other question, I entirely concur in the view taken by my noble and learned friend who has advised your Lordships that the judgment should

be affirmed. You can hardly expect that any case should assist you much in coming to a conclusion, because it does not depend you upon any general rule of law but upon the intention of the testator as expressed in the will, or in the deed of settlement which has been executed. And I entirely agree with what my noble and learned friend has said, that none of the cases which have been cited have the smallest application to it. We must look to see the intention of the testator from the language which he has employed. Now unless this will contains a direction, either expressedly or impliedly, to vest the accruing profits of the landed and personal estate which the testator left at the time of his death, and to entail the lands so purchased from time to time, it is perfectly clear that the surplus is undisposed of. And there is no other mode in which there is the smallest conjecture or hint that it is disposed of. Then if it is not to be so applied it is undisposed of. It goes to the son either as heir-at-law or next of kin. Well, then, if there is no such express directions in the will, is there anything from which you can conjecture that such was his intention? There is nothing of the sort. There is no language employed which, in my opinion, will admit of that construction.

An argument was strongly urged by Mr Stuart, who seemed to think that he had done enough by showing that what we call the legal estate in those rents and profits came to the trustees. To be sure they did, because with regard to the lands of which the testator died seised, they were devised to the trustees. With regard to the lands which were to be purchased afterwards the conveyance would be to the trustees. No doubt the trustees would receive the rents and profits, but not for their own benefit. They are purely trustees; and unless, in so far as the testator has pointed out what the trustees shall do, and what they shall receive, there is not the least vestige of any beneficial interest in the rents and profits.

Now it is quite clear to me when I look at the language of

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this instrument that it contains an express direction that this property, of which he died possessed, should be converted in the manner he directs; and that, with the proceeds, land should be immediately purchased; and that the lands of which he died seised and the lands purchased were the lands to be entailed. But there is no direction whatsoever that the rents and profits of those lands should be applied in the purchase of estates during the intermediate time between his death and the time when his son should either die or recover. I think, therefore, that it is quite plain that those rents and profits are undisposed of, and that being undisposed of they go to the son as heir-at-law.

A strong objection was made to the form of the decree, that it would allow the representative of the son, upon his death, to claim the legitim without accounting for the benefit which he has received under the will. But, my Lords, I think it was quite unnecessary for the decree to make any express provision upon that subject. The decree is in these words, "That the "pursuer as his *curator bonis* is entitled to demand and recover "the same without prejudice to the right of the said Thomas "Turnbull, or of his legal representatives afterwards, to exercise "his right of election, or to claim legitim as concluded for in "the first declaratory conclusion of the summons; and that the "same shall so belong to the said Thomas Turnbull, and form "part of his funds, whether effect shall ultimately be given "either to the said legal right of legitim, or to the testamentary "provision in his favour under his father's said deeds of settle-"ment."

Well, then, what is the point which is finally decided, and the only point which is finally decided? Why it is that the surplus of the intermediate rents and profits shall, in all events, belong to the son. Upon his death the election may then be exercised; and, if the legitim is preferred, that can only be done by giving credit or accounting accordingly.

For these reasons I entirely agree in the motion of my noble and learned friends.

Ordered and Adjudged, That the petition and appeal be dismissed this House and that the interlocutors complained of be affirmed. And it is further Ordered, That the Appellants do pay or cause to be paid to the Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant, &c.

SPOTTISWOODE and ROBERTSON—RICHARDSON, CONNELL, and LOCH, Agents.

[10*th April*, 1848.]

ALEXANDER WATSON, of Kilmalcolm, in the county of Renfrew, *Appellant.*

ALEXANDER R. JOHNSTONE, Merchant in Greenock, *Respondent.*

Prescription.—Novation.—Evidence.—Where a debtor enters into an arrangement with his creditors, which amounts to a re-constitution of their debts, and a provision for their payment, it is not competent to look to anything anterior to this arrangement as affecting the validity of the original evidence of the debt or its liability to prescription.

Insurance.—Evidence.—Acknowledgment of a debt arising from loss upon a policy of insurance, and a promise to pay, will, in the absence of production of the policy, elide an objection upon the 35 George III., cap. 63, that a contract of insurance can only be proved by a written policy duly stamped.

Prescription.—Trust.—A trust for payment of debts ends the plea of prescription.

Trust.—A trust for payment of debts, where the debtor is allowed to retain and administer his estate, and no discharge of him or his estate is given by the creditors acceding, does not preclude these creditors from going against the general estate of the debtor for payment of their debts.

Trust.—Evidence.—Prescription.—A recital, in an heritable bond to a third party, of a trust-deed having been executed by the granter for payment of his debts at his death, *held* to be evidence in a question with the creditors of the granter, sufficient to establish the trust, to the effect of eliding a plea of prescription.

IN the year 1807, Alexander Watson, who carried on business in Greenock as an underwriter, became insolvent, and executed

a deed conveying all his estate to trustees, for payment of his debts.

His creditors signed a deed of accession to the trust, but having perfect confidence in his integrity, granted him a supersedere from diligence during his life, and allowed him to retain possession both of his property and of the trust deed.

In the course of the same year (1807), Watson realized sufficient funds to pay his creditors a dividend of 12*s.* in the pound, which he paid them according to a scheme of division drawn up by him in his own handwriting. This scheme contained the following title, "State of claims upon, and payments made by, "Alexander Watson, underwriter in Port-Glasgow, among his "creditors, May 1807, which payments are made from proceeds "of his voluntary sale of house furniture, his whole premiums "for last April and next October, and a considerable advance on "his own credit by a friend, which advance, so far as not paid "at my death, to be a preferable claim on my estate.

"(Signed) ALEXR. WATSON."

This scheme was divided into columns, containing the following headings: "Creditors.—Claims.—Dividend, May 1807, "12*s.* per pound.—Creditors paid the dividend of May 1807.—"No.—We the creditors acknowledge to be now paid up "the remaining eight shillings per pound of our claims, with "interest."

After paying the dividend of 12*s.*, Watson continued his business as an underwriter in Port Glasgow until his death, which occurred in 1825.

In the year 1811, he had realised sufficient money to enable him to lend a sum of 700*l.* to M'Farlane, upon the security of an heritable bond which contained this recital:—"Know all "men by these presents, that I, Peter M'Farlane, merchant and "sugar-refiner in Port-Glasgow, acknowledge that I have of this "date, borrowed and received from Alexander Watson, town "clerk of Port-Glasgow, late underwriter there, 700*l.* sterling,

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"for granting these presents, which I do, formed as it is at his "express desire, and as the condition of the loan, of which sum "I acknowledge the receipt, renouncing every exception and "objection in the contrary; and oblige myself, my heirs and "executors, to pay the interest thereof to him or his assigns "during his life, half-yearly, at Martinmas and Whitsunday, "beginning the first at Martinmas next for what shall be then "due, and at the first term of Whitsunday or Martinmas after "his death the principal sum, in proportion to their claims, to "Robert Dennistoun, Richard Dennistoun, James Buchanan, "junior, and Colin M'Lachlan, and Colin Thomson, the "partners of George and Robert Dennistoun and Company, "merchants in Glasgow, and to David Connell and James "Connell, of said city, and the other partners, if any be, of "David and James Connell, merchants there, creditors of the "said Alexander Watson, the former for 350*l.* 2*s.* 3*d.*, under "deduction of 210*l.* 1*s.* 4*d.* paid in May 1807, and the latter for "335*l.* 13*s.* 2*d.*, deducting 201*l.* 7*s.* 10*d.* paid same time, both "by his acceptances to them, and to the survivors and survivor "of the said partners respectively, and their or his assigns, for "behoof of the said several companies, the residue of principal "and interest going to the lender's heirs or assigns, with a fifth "part more of the said principal, and of each term's interest ot "liquidate penalty in case of failure in payment thereof, "severally." And in the body of the deed there was the following statement:—"As the reason for taking this security, the "lender desires, in case of his death, to have this explanation "given in the body of the deed: that having as an underwriter "been unfortunate, he, while his credit was yet entire, none o. "his acceptances noted or protested, made a stop and a voluntary "conveyance of all that he had to his creditors, of his own "voluntary motive. The creditors without exception allowed "him to manage the trust affairs, retain the deed of trust, and "without any control, or asking him a question, received the

" dividend he made them of 12*s.* per pound, not even looking " at or desiring a state. But though the deed of trust signed " by them all bore that the lender should enjoy his future earn- " ings while he lived, yet George and Robert Dennistoun and " Company, and David and James Connell, did, at scarcely " twelve or eighteen months after, apply to know when he " would make a further dividend, and after being answered, both " by this lender and their own correspondents, that this was left " till his death by the trust acquiesced in by them, in case of " sickness or other disability preventing his following his busi- " ness, from which alone, if health permitted, he was to be " enabled to pay them, but that, notwithstanding thereof, he " was struggling hard, and even denying himself not merely " comforts, but necessaries, to get all paid off in his own life- " time, principal and interest, yet they repeated these applica- " tions from time to time, while not another creditor did so in " any shape, and the Messrs. Dennistoun went the length of " offering him their business at this port, on the base condition " of his allowing what arose therefrom to be applied to the " extinction of their claim, a proposition and undue preference " which he spurned at. The lender thinks this explanation due " to his character, and therefore having fulfilled, by complete " security for their payment, the obligation upon him toward " these two companies contained in his deed of trust, he will " very soon pay off all his other creditors, as he would have " these two also, had they acted a more handsome and feeling " part."

This bond was paid off in the year 1818, and a discharge duly attested was endorsed upon it by Watson in these terms:

" Messrs. Robert M'Lachlan, Archibald Falconer, junior, " James M'Lean, William Ewing, James Anderson, James " Cooper, and Alexander M'Lean, merchants in Port-Glasgow, " and Miss Mary Macfarlane, the accepting and acting trust- " disponees of the before-designed Peter Macfarlane, having now

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"paid me up the principal sum of 700*l.*, with 35*l.*, 8*s.* 6d. of "interest, contained in and due by the foregoing bond, I, at "their desire, and as their choice, do now acknowledge the "receipt of the said principal sum, and interest, now paid me as "in full and complete satisfaction of said bond, which, with my "sasine upon the security lands, and the whole title-deeds of "said lands, delivered to me and in my hands, I have now "delivered up to Mr James M'Lean, by whose hands the said "money has been paid, and I oblige myself and my heirs, to "warrant this receipt to be good at all hands, and against every "mortal."

Watson died in 1825, and in the year 1842 the Respondent brought an action against the Appellant, as Watson's heir and personal representative, concluding for payment of eight shillings in the pound of debts owing to four persons, whose names, together with the amount of their debts, appeared in the scheme of division which has been mentioned, and for interest upon the amounts from the time of the contraction of the debts.

In his summons the Respondent set forth that three of these debts were due upon promissory notes, which had been granted in the years 1806 and 1807; that the dividend of 12*s.* in the pound had been paid upon all of them, but that the balance continued owing at the time of Watson's death; and that he had acquired right to the debts by assignations from the creditors in the years 1827, 1840, 1841, and 1842. One of the debts sued for had been owing to a firm of the name of D. M'Dougall and Co. The promissory note which had been granted to them by Watson was in these terms:—

"79*l.* 17*s.* 11*d.* "Port-Glasgow, 23rd June, 1806.

"On the twenty-sixth day of October next, I promise to pay "Messrs. Dond. M'Dougall & Co., or their order, seventy-nine "pounds, seventeen shillings and eleven pence, for loss on sloop "'Friendship.'

"(Signed) ALEX. WATSON."

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The assignation to this debt upon which the Respondent sued contained the following recital:—"That in the year 1806, "or about that time, the said Company of Donald M'Dougall "and Company insured or caused themselves to be insured, "against loss by perils of the sea or otherwise, upon a sloop or "vessel called the 'Friendship' of to the extent of "79*l.* 17*s.* 11*d.*, or about that sum, with the deceased Alexander "Watson, underwriter in Port-Glasgow; and the said vessel "having been lost, the said Alexander Watson became justly "due and addebted to the said Donald M'Dougall and Com-"pany in consequence of said insurance effected as aforesaid in "the said sum of 79*l.* 17*s.* 11*d.*, for which sum the said Alex-"ander Watson granted the said Dond. M'Dougall and Com-"pany his promissory note, under date 23d June, 1806."

A statement almost *verbatim* the same as the foregoing was contained in each of the other assignations.

In support of this action the respondent founded upon the scheme of division, which did not, in the column for acknowledgement of payment of eight shillings in the pound with interest, contain the signature of any of the creditors whose debts he sued for, and indeed had the signature of only one creditor out of forty; at the same time, however, in a column containing the numbers of the creditors, there were the letters "pd." opposite the numbers of fourteen creditors. He also founded upon the statements which have been quoted from the heritable bond granted by M'Farlane to Watson in 1811.

The Appellant in defence admitted his representation of the original debtor, but denied that the several debts sued for were owing by him at the time of his death. He produced several documents showing that other creditors had been paid the second dividend of 8*s.* in the pound, and relied upon these and the letters "pd." in the columns as doing away any effect which the absence of the Respondent's signature in the column for receipt of the second dividend could have, by showing that other creditors

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had been paid although their signatures did not appear there. And he pleaded specially that the assignations under which the Respondent sued arose out of contracts of insurance which, under the 11th and 14th sect. of the 35 Geo. III., cap. 63, could not be pleaded or given in evidence unless by production of a formal policy duly stamped, a document which had not been produced in regard to any of the debts. That the evidence thus required by the statute could not be supplied by the promissory notes given by Watson to the creditors: And that the debts, even if proved, were prescribed by the triennial, sexennial, and vicennial prescriptions.

The Lord Ordinary (*Robertson*) upon the 1st July, 1845, decreed for payment of all the debts in terms of the libel. "In "respect, First, That the debts to which the pursuer has right by "assignations, now finally found to be regularly stamped and "executed, are acknowledged by the late Alexander Watson in "the State of Claims dated in May 1806 to be due by him, to "the amount of the principal sums now demanded. Second, "In respect of the statement contained in the heritable bond, "dated 18th July, 1811, and of the terms of the other docu- "ments, admitted to be genuine. Third, In respect that the "defender admits that he represents the said Alexander Watson, "and does not aver payment of any of the sums due at the "date of his death. And Fourth, In respect of the decision "of the Court in the case of Watson *v.* Hunter and Co. "18th February, 1841." The Court upon a reclaiming note adhered to this interlocutor. The appeal was against these interlocutors.

Mr. Wortley and *Mr. A. McNeill* for the Appellant.—I. The exact basis upon which this action has been brought does not appear. From the frame of the summons it is not certain whether it is founded upon the original contracts of insurance, upon the promissory notes, or upon what happened afterwards.

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All the documents upon which the claim is rested show, however, that the origin of the debts was contracts for insurance on which losses had been incurred; but as the statute is express in requiring that every contract of this kind shall be written, and in declaring that it shall not be given in evidence unless it is also stamped, the action cannot be supported without production of policies of insurance in respect of each of the debts upon which a claim is made.

With regard to the promissory notes, they are prescribed, under 23 Geo. III., cap. 18, by the lapse of six years from the time at which they were payable, and cannot form any ground for the action; though the debt may be left unaffected, the notes, as a proof of it, are extinct and cannot be of any avail; the debt must be proved by other means.

The only other evidence upon which the Respondent can rest, is the scheme of division and the heritable bond to McFarlane. These documents cannot be used as establishing any new or original debts, all the use that can be made of them is to prove previously existing debts; but then the question arises what debts? And the answer must be, debts arising upon contracts of insurance which brings the party back to the objection that such debts can only be proved by the policies of insurance.

[*Lord Campbell.*—It is the common practice in England, in insurance cases upon trials at Nisi Prius, where the loss has been adjusted, to produce the adjustment signed by the party and nothing more, and no more is required.]

But, admitting that the documents in question can be used as reconstituting the debt, do they, in fact, establish this? Though there is no receipt by the Respondents upon the scheme of division for the second dividend, the same circumstance is observable as to other creditors, who undubitably have been paid that dividend, even where the letters "pd." are not opposite their number in the scheme.

[LORD CAMPBELL.—Proof of payment to A does not raise any presumption of payment to B.]

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Perhaps not. But the whole circumstances here, in regard to so old a debt, give strong reason to presume that the debts sued for were paid as well as the others. At all events the scheme of division, which is the only document that establishes the debt, is open to the vicennial prescription of holograph writs by the statute 1669, cap. 9.

[*Lord Chancellor.*—By the terms of the trust deed, as stated in the bond to M'Farlane, Watson was to enjoy his earnings during his life; the debts, therefore, were not to be paid in his lifetime. No presumption of such a payment, therefore, can arise, and there is no allegation by the Appellant of payment since his death.]

There is no proof of the trust-deed or its terms; M'Farlane's bond is not signed by Watson; any statement in it therefore is M'Farlane's, not Watson's.

[*Lord Chancellor.*—But Watson has adopted the statement in the bond by signing the discharge upon the back of it. And if this trust-deed was in operation what prescription can there be of a trust?]

The case was not so pleaded below, the documents were only used as acknowledgments constituting the original debt, not as making any new debt.

Mr. Attorney and *Mr. Anderson* for the Respondent were directed to confine their observations to proof of the trust for payment of Watson's creditors, and to showing how the Appellant was entitled to proceed against Watson's general assets instead of coming in under the trust, as the only questions upon which the House entertained any doubt. But the observations which fell from the Lord Chancellor upon the subject make it unnecessary to give the arguments used by them.

LORD CHANCELLOR.—My Lords, after looking very attentively through these papers, and listening to the arguments

which have been addressed to your Lordships at the bar, there really is no difficulty in our disposing of this case. As to the point of fact whether these debts have been paid or not, it appears to me quite conclusively that they have not, and the more the matter is investigated the more free is it from any doubt. It is quite clear that they were not paid at the time the "State of Claims," as it is called, was made out. Numerous debts were then due. The note which we have of the trust in the heritable bond shows that the arrangement between the parties was, that for all the debts then due 12*s.* in the pound should be paid, and that 8*s.* should remain over until after the death of the debtor. And following the evidence there are the subsequent stages of the account and the subsequent receipts or marks upon that account of debts paid. Every debt which was paid is accounted for. The debts in question are not, and do not appear ever to have been dealt with as debts paid, but as debts which remained unpaid. That carries the transaction down to very recently before the death of the debtor, because we find a debt paid in the year 1825, and of that there is an acknowledgment, a memorandum, leaving no doubt of that fact; but there is no memorandum, no acknowledgment, nor any notice whatever showing the payment of the debts in question.

Then at the time of the death of the debtor, in 1825, these debts were debts owing, but they were debts owing upon a trust. Now at first sight, no doubt, it would appear singular that the trust is not proceeded upon; but that the claim is made by the pursuer in virtue of the assignments of these particular creditors, as for a substantive debt against the general estate. But when we look to all that we have had produced as to the contents of the trust deed, I think that that is sufficiently explained. It appears that at the time the trust deed was executed it was an assignment of all the party's interest, all his estate, in trust to pay his debts; but he himself recites that

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the creditors had so much confidence in him that they permitted him to be in possession of and to manage the estate, he being allowed to receive the income arising from the property until his death, and taking upon himself the duty, which nobody was bound to assume, of paying such debts as he could. The result of that, therefore, would be that at the time of the death, whatever estate there was coming would come to his representatives from him and be in his possession, he being the party left in possession of the estate.

Now that trust deed might have contained provisions discharging the general estate and leaving the creditors to proceed only upon the property named in the trust; but it does not at all follow that it did so, and, if it did not do so, then it was only an additional security to the creditors, and did not at all release the estate of the debtor from the obligation to pay beyond that contract, which is recited, of not suing him during the period of his life. That may or may not be so in point of fact. But if in point of fact there was any such release, then it is only to be found in the trust deed; it is not to be found in any part of that evidence which we have as affecting the contents of the deed, because that evidence does not contain an atom as to any discharge by the creditors, but refers only to the obligation which they have entered into of not suing the debtor during his life, they taking the payment in the mode prescribed.

Therefore the trust deed, according to the recital which we have, would be in the possession of the debtor. He remained not only in the possession of the property, but of the trust deed. If therefore produceable at all it should be produced by those who represent that debtor, if they have it. If they have it not, the only evidence which we have of its contents is comprised in the recital in the hereditable bond; and in that recital nothing whatever is to be found to bar the creditors from proceeding upon the right which they have independently of the trust.

Then that brings it down to the death of the debtor, and if

the debt does not rest either upon the policy of assurance or upon the notes, but rests upon the arrangement come to between the debtor and his creditors, in which he admits the amount due to them and provides for the payment of that amount, which in my opinion is now the state of the transaction between the debtor and the creditors, we cannot look at anything antecedent to the time at which the debt was so constituted, whatever may have been its origin. That therefore being the mode in which the debt was constituted at the time of the debtor's death, in 1825, no prescription has run from that period up to the time when proceedings were commenced, which was in the year 1842.

Under these circumstances, it remains clear that these are debts admitted to be due by the first of the transactions which took place in 1807, and nothing has occurred since to displace these debts; but it being clear that though they were due they were not demandable up to the time of the debtor's death, no prescription would run in the meantime.

Then, with regard to the interest, these were clearly debts carrying interest, and nothing has taken place between the parties which would prevent interest running from the date of the arrangement. We are referred to the memorandum of payment of some of the debts, in which interest is calculated from that time. There is, therefore, no contract to prevent the parties from having the benefit of the debt; it is only the payment of the 12*s.* of the debt, but leaving the other 8*s.* of the debt just as it stood before, with the additional security whatever that might be, comprised in the trust,—a security which the creditors, having entire confidence in their debtor, appeared at a subsequent period to have relinquished; but still the contract with the debtor at the time of his death remained, and although that contract was broken by some of the creditors there is no evidence whatever of the contract not having been kept by the creditors in question.

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There is one question remaining, which is, whether certain parties who are creditors can act for others. We do not know at all what arrangements were made between them; but this we know, that between one person whose name appears in the list of debts, and the debtor, the sister was recognised as a creditor, and entitled to receive the amount. In the absence of all evidence as to the nature of that transaction, we must recognise the debt as the debtor himself recognised it, as a debt owing by him and payable to the sister,—whether for her own benefit or for the benefit of her brother, is a matter which we cannot determine; we can only deal with it as the debtor dealt with it. Under these circumstances it appears to me that on all the points the interlocutor appealed from ought to be affirmed.

LORD CAMPBELL.—My Lords, it appears to me that not one of the three reasons upon which the Appellant relies can be supported: the first is, that the Respondents' claims arising upon contracts of marine insurance, could only be established by showing the policies, and by proof of possession of insurable interests in the different vessels to which the claims referred, and of their loss by perils of the sea within the terms of the policies; in short, that this claim could not be supported without proving everything which it would be necessary to prove, if the debt never had been acknowledged by the underwriter, and if it were necessary to prosecute him upon the policy. It would be a very strange state of the law of Scotland, if that were so laid down. It is preposterous to say that after this settlement, and the constitution of the debt, when the creditor would have been fully justified in throwing all the vouchers into the fire by which the debt had been originally constituted and proved, if the payments were afterwards refused, he should be thrown back into the same situation as if the debt had been denied. I am very glad to find no authority whatsoever in sup-

port of such a doctrine as has been brought forward; it is contrary to reason, and it seems to me to be without any decision. By our practice in England, after the adjustment of a policy of insurance, nothing more is necessary than to prove the signature of the underwriter to the adjustment; but here the debt has been reconstituted in a formal manner, and it is not at all to be considered that the creditor is in the same situation as if the debt had always been denied, and he were to proceed upon proof of its original constitution.

Then, my Lords, with regard to prescription; according to the turn which the thing has taken, and the situation of these parties, it is only a vicennial prescription that can be relied upon, the debt being re-constituted. The action is brought in the year 1842, within the twenty years, and therefore that prescription will not apply.

The only other ground upon which the Defender has rested his case, is, that it is to be presumed that these debts have been paid. Now it seems to me that the party was very well advised not to accept an issue, for if it had gone before a jury, they could not have hesitated for one moment in coming to the conclusion which has been arrived at by my noble and learned friend, and in which I entirely concur, that these debts never have been paid. There are no materials whatever from which any such presumption can be drawn in point of law. Because one debt has been paid, it does not follow in the slightest degree that another debt has also been paid. There are two or three matters which occurred in the lifetime of the debtor himself, from which it is quite apparent to me that he died without having paid these debts; and since his death it is evident that not a shilling of them has been paid.

I think that the interlocutor of the Court of Session, adhering to the decision of the Sheriff, was perfectly well founded. Upon the question as to the interest; looking to the transactions between Watson and his creditors, it appears to me that

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12s. in the pound was paid in the meantime, and that time was given for the payment of the remainder of the debt until his death; but there is no renunciation of interest. The debt before was a debt that would have carried interest; there is no stipulation that interest shall be waived and abandoned; and it seems to me that the 8*s.* remaining would carry interest, just as the whole 20*s.* would have carried interest.

It seems to me, therefore, that the interlocutor must be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed. And it is further Ordered, That the Appellant do pay or cause to be paid to the Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant, &c.

LAW, ANTON, and TURNBULL—LE BLANC and COOK, Agents.

[10*th April*, 1848.]

THOMAS BAILLIE, Solicitor in the Supreme Courts of Scotland, *Appellant.*

DAVINIA and MARGARET MCGIBBON, Representatives of the deceased MARY MCGIBBON and Others, *Respondents.*

Bankrupt.—Jurisdiction.—The Sheriff has power to award the professional expenses incurred during a contested election for the office of Trustee on a sequestrated estate, as well of the creditors as of the competitors for the office.

Reduction.—Jurisdiction.—The act of a Sheriff in awarding expenses upon a higher scale than allowed by statute, is not an excess of jurisdiction to be corrected by reduction, but of judgment to be corrected by appeal.

BY the 13th section of the 2 and 3 Victoriæ, cap. 41, it is enacted that the Lord Ordinary in the Court of Session, shall, upon a petition to that effect, award sequestration of the estates of a debtor, and appoint two successive meetings of the creditors, for the appointment of judicial factor and trustee, "and " he shall likewise remit to the Sheriff of the county where the " meeting is to be held, to proceed in manner hereinafter " mentioned."

By the 27th section, it is enacted, "That, notwithstanding " the said remit to the Sheriff, the process of sequestration shall " be held to be in the Bill Chamber of the Court of Session, " and shall not fall asleep; and on the said remit being made, a " copy of the petition for sequestration, and of the first deliver- " ance, and also (where it is different) of the deliverance award- " ing sequestration, certified by one of the clerks of the Bill " Chamber, shall, with the productions, be transmitted by the

"petitioner to the sheriff-clerk of the county or place where the "meeting for election of interim factor is directed to be held; "and the Sheriff shall have as full power and jurisdiction as "hitherto possessed by the Court of Session (subject to review) "in all questions in the sequestration, except in those cases "where the power is otherwise specially conferred: And the "Sheriff-clerk and Messengers-at-arms, and officers of the "Sheriff Court, shall have power to act in their respective "offices under this Act; and the sheriff-clerk shall keep a "register of sequestrations transmitted to him in terms of the "said schedule (A)."

By the 45th section, it is enacted, "That creditors, or their "mandatories, qualified as aforesaid, shall assemble at the times "and places fixed respectively for the election of interim factor, "and for election of the trustee, with power to adjourn for such "reasonable time as may seem fit, provided such adjournments "do not postpone the meetings for the election of interim factor "and trustee, beyond the limits of the periods within which "these meetings are by this Act appointed to be held; and the "Sheriff-clerk shall transmit, or cause to be transmitted, for "exhibition to the meeting for the election of interim factor, "the certified copy of the petition for sequestration and deliver- "ances thereon: and if two or more creditors shall give notice "to the Sheriff or Sheriff-substitute of the county, such Sheriff "or Sheriff-substitute (or, in case of necessary absence, a "Sheriff-substitute authorised by the Sheriff to act under the "Act,) shall attend the meetings, and adjourned meetings, and "preside; and the Sheriff-clerk or his depute shall also attend, "and mark the oaths and productions with his initials, and "write the minutes in the presence of the meeting, and enter "therein the names and designations of the creditors present, "or the mandatories of creditors, and the amount for which "they claim, and any other circumstances which the presiding "Sheriff shall judge fit, which minutes the presiding Sheriff

" shall sign; and the clerk shall retain the oaths of the several " claimants subject to exhibition thereof in his hands till the " election shall be determined, when he shall deliver the same " to the interim factor or trustee, (as the case may be); and " where the Sheriff or Sheriff-substitute is not present, the " creditors shall elect a preses; and (if the Sheriff-clerk or a " depute be not present) a clerk; and the preses shall mark " the oaths and productions with his initials, and sign the " minutes, and the clerk shall, in the presence of the meeting, " write the minutes, and enter therein the names and designa- " tions of the creditors or mandatories, and the amount for " which they claim, and any other circumstances relating to the " said meeting."

The 46th section enacts, "That if the Sheriff or ordinary " Sheriff-substitute be present at the election either of interim " factor or trustee, and there be no competition for the office, " or objections stated to the candidate or candidates, he shall, " by a deliverance on the minutes, declare the person chosen by " the creditors to be interim factor or trustee; and if there be " competition or objections to the candidate or candidates, any " objections shall be stated at the meeting to the votes or candi- " dates, the Sheriff or ordinary Sheriff-substitute may either " forthwith decide thereon, or make avizandum, and he shall, if " necessary, make a short note of the objections, and of the " answers, on which he shall, within four days after the meeting, " hear parties *vivâ voce*, and declare the person to be interim " factor, or (as the case may be) the person or persons, trustee " or trustees in succession, whom he shall find to have been " duly elected, and state the grounds of his decision in a note, " and the same, as well as the said short note, shall form a part " of the process."

The 47th section enacts, "That where the officiating Sheriff " present at said meeting for the election is a Sheriff-substitute " appointed to act in the absence of the Sheriff, or of the ordi-

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"nary Sheriff-substitute of the county, or where the preses has "been elected by the creditors, such substitute or preses "(whether there be any competition or objection or not) shall "forthwith report the proceedings to the Sheriff or ordinary "Sheriff-substitute, and the oaths of the several claimants shall, "if the Sheriff-clerk or his depute be present, remain in his "possession, or, if he be not present, shall be transmitted to "the Sheriff-clerk by the preses, to be retained by him till the "interim factor or trustee (as the case may be) shall be finally "appointed,—when he shall deliver the same to such interim "factor or trustee; and if there be no competition or objection, "the Sheriff, or ordinary Sheriff-substitute, shall declare the "person elected interim factor, or (as the case may be) trustee "or trustees in succession; and if there be competition or "objection, the parties shall, within four days from the date of "the said meeting, lodge in the hands of the Sheriff-clerk short "notes of objections; and the Sheriff or ordinary Sheriff-"substitute shall forthwith hear parties thereon *vivâ voce*, and "give his decision, and state the grounds thereof in a note, "which note, as well as the said short notes, shall form part "of the process, and the deliverance of the Sheriff or Sheriff-"substitute, declaring the person elected to be interim factor, "shall be final, and in no case shall be subject to review in any "court, or in any manner whatever."

The 49th section enacts, "That, on the bond for the interim "factor being lodged, the Sheriff shall confirm his election, "which confirmation shall be final, and not subject to review in "any court, or in any manner whatever; and the Sheriff-clerk "shall issue an act and warrant, in the form of schedule (E) "hereunto annexed, to the interim factor; and in the event of "the said deliverance declaring the election of trustee becoming "final by no appeal being entered as hereinafter provided; "and in case of any such appeal being entered, and the compe-"tition or objections being finally disposed of, and on a bond

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" being duly lodged as aforesaid, the Sheriff shall confirm the " election of the person elected or preferred as trustee, which " confirmation shall be final, and not subject to review in any " court, or in any manner whatever; and the Sheriff-clerk shall " issue an act and warrant, in the form of schedule (F) hereunto " annexed, to the trustee," &c.

The 54th section enacts, " That any creditor or competitor " giving notice in writing to the Sheriff-clerk, within two days " after the date of the Sheriff's deliverance declaring the elec- " tion of the trustee, of his intention to appeal against such " deliverance, shall be entitled to appeal during Session, to the " Inner House of the Court of Session, or in vacation to the " Lord Ordinary, provided that, in the case of a competition, a " bond of caution for the competitor, signed by a cautioner " approved of at the said meeting for election of trustee, shall, " along with such notice, be lodged with the Sheriff-clerk, and " a certificate thereof by the Sheriff-clerk, with a note of appeal " against such deliverance, be lodged with and marked by the " clerk of the Bill Chamber, within fourteen days from the date " of such deliverance; and on a copy of such note, certified by " one of the Bill Chamber clerks, being delivered to the Sheriff- " clerk, he shall forthwith transmit to the Bill Chamber the " minutes of election, together with such of the proceedings as " may be required; and the Inner House or the Lord Ordinary " (as the case may be) shall thereupon hear parties *viva voce* " and pronounce judgment, and may order a new election, and " appoint a time and place for that purpose; and if the appeal- " ing competitor shall be preferred, a remit shall be made to the " Sheriff to confirm him; and no part of the expense of such " competition, either before the Sheriff Court or any other " Court, shall be paid out of the estate, but the expenses shall " be ordered to be paid by the unsuccessful party to the suc- " cessful party."

The 128th section enacts, " That it shall be competent to

"bring under review of the Inner House of the Court of Ses-
"sion any deliverance of the Sheriff, (except when the same is
"declared not to be subject to review,) provided a note of
"appeal shall be lodged with, and marked by one of the Bill
"Chamber clerks, within twenty-one days from the date of such
"deliverance, (except in the case of appeals against a deliver-
"ance declaring the election of a trustee, which shall be lodged
"as hereinbefore provided,) failing which the same shall be
"final."

And the 132nd section enacts, "That it shall be lawful for
"all agents, duly qualified to practise before the Court of
"Session, to practise in all Sheriff Courts, in so far as relates
"to any of the proceedings authorized by this Act to be carried
"on before the Sheriff, provided that they shall not be entitled
"to payment of any higher fees than those legally exigible in
"such Courts."

On the 23rd of December, 1841, the Lord Ordinary on the petition of the Appellants, awarded sequestration of the estates of Neil McGibbon, deceased, appointed meetings of the creditors to be held for the appointment of interim factor and trustee, and remitted to the Sheriff, "to proceed in manner "mentioned in the said statute."

On the 31st January, 1842, a meeting of the creditors was held at Inverary for the purpose of electing a trustee. This meeting was attended by the Appellant, as a creditor on his own account, assisted by counsel. It was also attended by the clerk of Mr H. Graham, a Writer to the Signet, from Edinburgh, acting as mandatory for several creditors, and by mandatories for other creditors. The meeting was presided over by the Sheriff of the county of Argyle.

A variety of mutual objections to the claims of each other to vote, were taken by the Appellant, and by the other persons present. The Appellant tendered his vote for Traill as trustee, and the other persons voted for Lindsay. The 31st of January

was occupied in hearing these objections, and likewise the 8th and 9th of February, to which days the meeting was adjourned. On the 9th, the Sheriff made avizandum with the objectio ns and appointed parties to be heard before him *vivâ voce* on the 10th. Parties were accordingly heard upon that day. The Sheriff finally sustained the claim of the Appellant to vote, and of some of the creditors to whose claims the Appellant had objected; while he rejected the claims of the others, and declared Lindsay to have been chosen trustee.

Traill, the disappointed candidate, and the present Appellant, appealed from the Sheriff's decision to the Court of Session; but they afterwards withdrew their appeal, in consequence of an unfavourable decision of that Court upon another appeal taken by them, in regard to the claims of some of the creditors who had voted against them, and paid the expenses of the Respondents in the Court of Session, which were awarded to them by that Court. To the appeal so withdrawn, Lindsay, the successful candidate, was the sole Respondent.

On the 26th March, 1842, the Sheriff, upon the motion of the Respondents, pronounced the following interlocutor, "Having "heard the agent for Mrs Mary M'Gibbon, and for the other "creditors who supported the successful candidates for the "offices of trustee and commissioners, and whose claims have "been specially sustained by the Sheriff, on the motion made "first for the expenses occasioned to them in the proceedings "before the Sheriff by the opposition of Mr. Thomas Baillie "and Duncan Bell, or his mandatory, and secondly, for the "confirmation of Mr. Donald Lindsay as trustee in terms of "the statute;—In respect of the bond of caution lodged with the "Sheriff-clerk, and of the interlocutor of the Court of Session, "dated 10th March current, the said Thomas Baillie and Dun-"can Bell, although notice was sent to their agents of the motion "for expenses, having failed to appear before answer, makes "avizandum with the cause." And on the 29th of March, the

Sheriff pronounced two separate interlocutors. By the first he found the Appellant and Bell, the only creditor who had voted with him, liable to the Respondents "in the expenses occasioned "to the said claimants by the opposition offered on the part of "the said Thomas Baillie and Duncan Bell, at and subsequent "to the meeting for electing a trustee and commissioners, to "the election of the successful candidates for the said offices of "trustee and commissioners." By the other interlocutor the Sheriff confirmed Lindsay's election, and allowed an extract of the confirmation to go out "without prejudice to the inter-"locutor of this date, finding Thomas Baillie and Duncan Bell "liable in the expenses occasioned by their opposition to the "election of the said trustee and commissioners, incurred "before the Sheriff, as to which continues and reserves the "proceedings until the expenses shall come to be modified and "decerned for; but allows the act and warrant of confirmation "in favour of the trustee to go out and be extracted ad interim."

Under the first of these interlocutors the expenses to which the Appellant was found liable were taxed at 99*l.* 0*s.* 10*d.*, subsequently modified to 92*l.* 4*s.* 4*d.* by interlocutor of 26th September, 1842. This taxation took place upon an account which embraced the proceedings at the meetings of 31st January, and 8 and 9 February, and was composed of charges made after the scale allowed to that branch of the profession which practises in the Court of Session, amounting in the whole to 83*l.*; the rest of the account was made up of charges by a practitioner before the Sheriff Court, after the scale allowed in that Court.

On the 18th of October, 1842, the Sheriff allowed decree for the taxed expenses to be extracted within twenty-one days from the 14th October. On the 4th November the Appellant lodged an appeal against the interlocutor of 26th September, modifying the expenses. The Respondents objected that this appeal was too late, under the 128th section of the statute.

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The Appellant acquiesced in the force of this objection and withdrew the appeal; but immediately presented a note of suspension, and brought an action for reducing the Sheriff's interlocutors of 29th March and 26th September.

In the action of reduction the Lord Ordinary, upon the 20th of March, 1845, repelled the reasons of reduction, and assoilzied the defenders from the conclusions of the action. And on the 15th November, 1845, the Court adhered to the Lord Ordinary's interlocutor.

Mr. Rolt and *Mr. Crawford* for Appellant.—I. The Sheriff had no jurisdiction to award expenses to the Respondents. During the proceedings at the meeting of creditors held on the 31st January and the 8th and 9th of February, nothing of a judicial nature occurred. The Sheriff presided over the meeting, and signed the minutes as "Preses," because the statute gave a preference to him when present; but in doing so he exercised no judicial function any more than any private creditor who might have been appointed Preses in his absence could have done. The first judicial step taken by the Sheriff was his interlocutor making avizandum at the close of the meeting on the 9th. Up to this point the Appellant had not assumed the character of a litigant before the Sheriff; all he had done was to exercise the right which the statute gave him as creditor to vote for his own candidates and to object to the admission of improper votes for other parties. Up to this time there was not only no litigation but no suit or judicial record; all that existed to show what had passed was the minutes of the creditors' meetings.

Unless, therefore, the statute expressly gave the Sheriff jurisdiction, he could have no power to award the expenses which had been incurred by any of the parties prior to the 9th February, for nothing had occurred to justify the award as made in exercise of his ordinary jurisdiction. Such jurisdic-

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tion as the statute gives to the Sheriff takes its foundation from the 13th section, which directs a remit to be made to him, "to "proceed in manner hereinafter mentioned." By the 45th section the creditors are to assemble for the purpose of election, and the Sheriff is to preside over them; but the power to adjourn is not given to him, whether present or absent, but to the creditors themselves.

So soon as the election is over the character of the Sheriff's interference changes. By the 46th, 47th, and 49th sections it then assumes a judicial nature, and so, in truth, do the proceedings of the creditors. But even after the Sheriff's functions have assumed a judicial character, there is no power given him by the statute to award costs. Neither in the direction to hear the parties *viva voce* upon their objections, and give his decision as to their election, nor in the direction to confirm the election, is there any authority given, express, or implied, to award costs. The interlocutor of the 29th March, 1842, therefore, which awarded costs was without any warrant from the statute, and so was the latter part of the other interlocutor of the same date, which, after confirming the election of Lindsay, kept the proceedings open in order to work out the finding for expenses. This was necessary for that purpose but was without authority, for, with the confirmation of the trustee, the jurisdiction of the Sheriff was at an end. No doubt the 27th section says the Sheriff shall have "as full power and jurisdiction as hitherto "possessed by the Court of Session;" but that is qualified thus, "except where the power is otherwise specially conferred;" and the 13th section says, he is to proceed "in manner hereinafter "mentioned." The Sheriff is not, therefore, to have the general jurisdiction of the Court of Session. All that is meant is that, having delegated to him the jurisdiction of that Court, what he does in conformity with the statute, shall have the same force as if done by the Court of Session. Thus the confirmation of the trustee, if not appealed against, is to be as bind-

ing as if it had been made by the Court of Session. But if, by the words quoted, the Sheriff were to have the general jurisdiction of that Court he might order a new election; a power which, both under the 54th section of the present statute, and by the prior statutes, is given to the Court of Session. If, then, the Sheriff has jurisdiction to award costs, it must be found elsewhere than in these words of the 27th section. In the close of the 54th section there is a negative provision, implying power to award costs, but the whole of that clause has reference to an appeal to the Court of Session, and is confined to the case of a competition where there is a contest between the candidates themselves, and cannot be so stretched as to apply to the proceedings of the creditors in their meetings; besides, the words are "the expenses either before the Sheriff Court or any other "Court;" but the Sheriff, while sitting as preses of the creditors, was not in any Court; and the expenses are to be paid "by "the unsuccessful party to the successful party," but each creditor exercising his right to vote, and doing no more, cannot be called "a successful," or "unsuccessful," party, in the sense in "which these words are used in this clause," and the power, such as it is, is not given to the Sheriff, but the Court of Session.

II. Although the Sheriff should be held to have power to award expenses he cannot have any to award them against one set of creditors in favour of another. Till after the actual vote of the creditors appointing the trustee there is nothing judicial, either in the character of their proceedings, or in the Sheriff's duties. And neither justice, reason, nor propriety will suggest that a creditor, appearing to take part in an election, which is to be one of free will, should do so under the penalty of paying the expenses of his fellow creditors, who may outvote him, incurred merely in their attendance upon the meeting. And so far as regards the 54th section, as has been already shown, that has reference to the case of competitors for the office appealing

to the Court of Session. Even if it were held to embrace an appeal by the creditors themselves, its operation must be limited to that part of the proceedings which is of a judicial character. The words are "before the Sheriff Court or any other Court," but the Sheriff, while acting as preses of the meeting, was not sitting in any Court, and the limitation of the power to the judicial part of the proceeding is quite consistent with reason; for it is one thing for a creditor to exercise his right of election in such a way as he may think will make it effective, and quite another for him after he has done so, to try to disturb what has been done by an appeal to a judge. He is then following the course of any other litigant.

IV. But, assuming the Sheriff had power to award costs, and costs from one creditor to another, he had no power, when the agent was a practitioner before the Superior Courts, to award costs upon the scale of fees allowed in these Courts. The 132nd section of the statute is express, that agents qualified to practise before the Court of Session shall have power to practise before the Sheriff Court, but that they shall not be entitled to payment of "higher fees than those legally exigible in such "Courts." In the taxation of Graham's expenses, therefore, the charges should have been cut down to the scale of the Sheriff Court fees, and in awarding expenses upon a higher scale, the Sheriff proceeded *ultra vires* and in disregard of this enactment.

V. The objection to the interloctuor upon all these grounds is the proper subject of an action of reduction. Relief could not have been obtained by an appeal to the Court of Session under the 128th section of the statute, for, if that mode of remedy had been adopted, the right to relief could only have been supported by showing objections to the interlocutors upon their merits; whereas the objection is, in truth, that they were pronounced upon matter *coram non judice*, which applies equally to the allowance of expenses, upon an improper scale of charge, as to

the general finding of expenses, for if the general finding fails for want of jurisdiction, so must the allowance of the particular scale.

Mr. Bethel and *Mr. Anderson* for the Respondents.

LORD CHANCELLOR.—My Lords, this is one of those cases in which one cannot but regret that the parties have thought proper to indulge themselves in coming to this House, on a matter in which, if they entirely succeeded, they could not by possibility have done so without an expenditure far exceeding the value of the subject matter in contest. However, the parties have a right to come here, and they have done so, and we must dispose of the matter on the principles of law applicable to the case.

My Lords, the case turns entirely on the question, whether the matter, being brought before the Court of Session for reduction, that Court should dispose of it in that form or not; and it arises on a question of sequestration, which, under the Act of Parliament, was referred to the Sheriff; proceedings took place before the Sheriff, and a contest arising as to the office of trustee, some parties preferring one person, and other parties preferring another, some expenses were incurred, and the result was, that the Sheriff decided in favour of one of the parties, and the party disappointed who was not successful, might, under the express provisions of the Act, have applied to the Court of Session to raise again the question which the Sheriff had decided. He might have done so under the 28th section, which provides, "That it shall be "competent to bring under review of the Inner House of the "Court of Session, any deliverance of the Sheriff (except where "the same is declared not to be subject to review), provided a "note of appeal shall be lodged with and marked by one of the Bill "Chamber Clerks within twenty-one days from the date of such "deliverance (except in the case of appeals against a deliverance

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"declaring the election of a trustee, which shall be lodged as "hereinafter provided), failing which the same shall be final." But the parties permitted the time to elapse, they found they were too late in the appeal, and they determined to bring an action of reduction, and the ground of reduction attempted to be supported was, not that the Sheriff had done anything within his jurisdiction which ought to be corrected, (for that, it is admitted, cannot be the subject of reduction), but that the Sheriff had exceeded his jurisdiction, and the grounds on which he was supposed to have exceeded his jurisdiction were, first of all, because it was contended the Sheriff had no jurisdiction to give costs at all; that if he had any jurisdiction in the matter, he had no jurisdiction to award costs as between competing creditors, each being anxious for the appointment of a particular trustee; and further, that he had no jurisdiction over costs in proceedings before himself, or in some other stage of the proceedings which it is not material in the view I take of the case to particularize. Thirdly, it was said he had exceeded his jurisdiction, because he had not adhered to the rules laid down in the 132d section, by which it is provided that parties practising in the Court of Session may practise in proceedings before the Sheriff, but that in coming in before the Sheriff, they should have no other costs allowed them than what are allowable in that Court.

This being a new subject matter for the jurisdiction of the Sheriff, it might be well supposed there were a great many proceedings under the Act of Parliament before the Sheriff, as to which there would be no rule to be found in the Sheriff's Court as to costs The scale of fees there would be applicable to matters therefore under the jurisdiction of the Court, but as new matter was introduced, it would be difficult to find a new scale of fees. The opinion I have formed, however, does not turn on that, I only mention it because the learned Judges below seem to have found great fault with the Sheriff for having

departed from the rule laid down by the statute. The purpose I have in referring to that section is to show that the Judges might have complied with the provisions of that statute in respect of the allowance of costs.

With regard to the first question, my Lords, that the Sheriff had no jurisdiction, it seems to me the clauses referred to, the 54th and 132d, put it beyond the possibility of doubt, for it is first of all declared that the Sheriff should have the same power as the Court of Session had; and the Court of Sesssion no doubt had the power and jurisdiction to give costs. If there is any doubt about that the 54th section provides for costs, not only before the Court of Session, but for costs before the Sheriff; then comes the very clause in question, which directs the scale and mode in which the costs are to be paid, a scale and mode for paying costs, which on the arguments used, the Sheriff had no right to look at. On these various clauses, I myself think that the first point cannot be maintained, namely, that the Sheriff had no jurisdiction over costs.

Then, my Lords, comes the question whether, if he had jurisdiction over costs, he had any jurisdiction over costs as between creditors. The 45th and 46th sections show that the competition may be raised by a creditor; it could only be raised by a creditor. Who is to elect? The creditors; one creditor proposes one individual, another creditor proposes another individual; they are all in competition; an individual has no right to come and say, "Appoint me;" he has no right to come before the Court and say, "My position here is that of a trustee; it is the act of the creditors; the sections treat the competition as raised by the creditors; at the close of the section—in order, if there should be any doubt, to remove it—it drops the word "creditor," and says, "the expenses "shall be ordered to be paid by the unsuccessful party." Here, my Lords, we have then a provision that creditors

shall enter into a competition, and that the party successful shall have the costs against the party who is unsuccessful. Can it be contended that a creditor is not a person entitled to costs within the provisions of that section? The 45th and 46th recognise the competition, and the 54th shows how it shall be dealt with.

Then, my Lords, with regard to the costs incurred before the Sheriff, that very provision referring to costs before the Sheriff, as well as before the Court, clearly shows that the costs to be given were costs, as well in the one case as the other. The competition arises from the first moment—the beginning—it arises when there is a difference of opinion between the creditors, one proposing one party, and the other another party.

The next question is one which has been the subject of much discussion, and according to the opinions of the Judges below, was the subject of most doubt, viz., whether there was such an erroneous proceeding on the part of the Sheriff as brought the case within the rule as to excess of power; and supposing the rule to apply, whether a reduction could be maintained if it was a matter beyond his jurisdiction, notwithstanding the decision of the Sheriff is to be considered as final. I will assume that if it is beyond the jurisdiction, it is a proper subject for reduction; and then we will see what the act is. The Sheriff, I will assume, now has to deal with the costs; he is, by section 132, to adopt a particular scale, that is to say, he is to apply the scale existing in his Court to this new state of things; they say, "You have not done that; you have adopted a scale which is "in use in the Court of Session, a higher scale," therefore, giving the party a higher remuneration than he would have under the scale adopted in the Sheriff's Court; and therefore they say he is doing that which is not within his jurisdiction; his jurisdiction is to do right, and he is doing wrong; but that is not the sense in which the term is used. Is the subject-matter within

his jurisdiction? Has he erred in deciding that which he was by law compelled to decide upon? If there be an error in dealing with that which is within his jurisdiction, it is not a subject for reduction, though it would be a subject for an appeal. It is true a scale was laid down; but is this a matter so clearly not within his jurisdiction as that it should be treated as a nullity? and is the party not to apply to the proper authority by appeal, to set aside what he has done, but to apply to the Court of Session for reduction? Suppose the Act of Parliament contained a scale, and the Sheriff had not adhered to that scale, but in taxing the bill of costs he had in some instances allowed more than that scale had allowed, and more than the Act itself prescribed, that is not to be corrected in this way; the answer would be, as the subject-matter was within your jurisdiction, you have erred in the exercise of your jurisdiction.

That, my Lords, disposes of all the grounds which have been the subject of this unfortunate appeal. My opinion is, that the majority of the Court of Session were right in the decision to which they came, and that the interlocutor appealed from must be affirmed wth costs.

LORD CAMPBELL.—My Lords, I fully agree with my noble and learned friend, and I do not think it necessary to add anything to his very lucid exposition of the case. I never had the smallest doubt, since the commencement of this case, that the Sheriff had jurisdiction over the costs in this case. As to that conundrum about excessive jurisdiction, it can only be supported by saying that there is an excess of jurisdiction whenever the Judge has made a mistake. For these reasons I concur in the motion, and I think that the judgment below must be affirmed with costs.

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Ordered and adjudged, That the petition and appeal be dismissed this House, and the interlocutors therein complained of be and the same are hereby affirmed, &c.

A. H. SMITH—SPOTTISWOODE, and ROBERTSON, Agents.

[18*th April*, 1848.]

JOHN FLEMING and Co., Merchants in Glasgow, and others, owners of the ship "William Nicol," *Appellants.*

ARCHIBALD SMITH and Others, Underwriters, *Respondents.*

Insurance—If the insured having received letters intimating damage to their vessel, and the measures taken to repair it keep those letters without communicating their contents to the insurers, and give directions for the reception of the vessel as their own property, they cannot afterwards, on the pretext that they were not fully informed of the nature of the damage sustained and of the extent of the repairs, abandon the vessel, and claim for a total loss.

Ibid. — Where a vessel sustains damage, but is capable of being repaired at a cost exceeding her value after the repair, the owners, in order to entitle themselves to claim as for a total loss, must give notice of abandonment within a reasonable time after receiving advice of the damage. *Semble.*

ON the 18th August, 1841, the Appellants effected a time policy of insurance upon the ship "William Nicol," for 6000*l.* for one year, in port and at sea, in all places, at the rate of 5*l.* per centum.

On the 4th of September the vessel sailed from Leith on a voyage for Port Philip and Port Adelaide. After discharging at these ports in the month of March 1842; she took in a cargo for Bombay early in the following April. On the 18th and 19th May she encountered a hurricane which did such damage to her masts and rigging, as induced the master, after consulting with his officers, to abandon the voyage to Bombay and steer for the Mauritius. The vessel again encountered severe weather

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in the prosecution of the voyage to that island, and reached it in a very damaged state on the 31st May, 1842.

On the 5th of September the Appellants received a letter from Captain Elder, the master of the ship, dated 5th June, in which he described the events of the voyage, and the injury the vessel appeared to have received; and continued thus: "And if it "should be for your interest to condemn the ship, if the repair "should amount to so much as make your one-third part of the "insurance which you will have to pay very heavy, I shall cer- "ainly do so, as the 6000*l.* she is insured for I believe is more her value; but, before I can do this we must have ten- "ders in to see that the underwriters will save by selling the "ship as she is, than laying out so much money on her. I "have consigned the ship to Messrs. Hunter and Arbuthnot, "who are Lloyd's agents, and who are accustomed to all the "forms. There is one thing, however, I must also state,—The "rigging was entirely done, fore and aft, eight years was a long "time for it to be over the mastheads. I mentioned this to "you when I joined the 'William Nicol.' The masts were far "from sound, and the sails, from the heavy weather we ex- "perienced going out to Australia, entirely worn out, so that, "if we had gone to Bombay, we should have required to have "coppered her, a new suit of sails, and perhaps rigging, which "must have fallen very heavy on you alone. And I think, that "if you come on Scott & Sons for their share of the yellow "metal, having given way before the two years were expired, of "which I shall send you certificates; and upon the insurance "for the rest, you may by this save your expense of one-third; "and if the amount of repairs, by paying for your share of one- "third, being new for old, come to under a 1000*l.*, I think it "might be for your advantage to repair her, as the vessel will, "on leaving this, be as good as new. There is no yellow metal; "I am therefore obliged to copper her, which would last out "all her first letter. Whatever I may do, I shall act accord-

"ingly to the best for your interest. It was clearly an act of "Almighty God, which no human arm could help or avoid. "And if the ship is repaired, I would hope that we may get "a freight from here to anywhere that will pay. In about six "weeks, there is a regiment to leave here for Bombay or China, "and if so, I am sure we shall get it—Mr Arbuthnot being "married to a daughter of the commander-in-chief. This would "pay your share of the loss. If, from late accounts from Bom-"bay, things are still so low, it would perhaps be better not to "go there, if freight can be obtained elsewhere. This must "all depend on circumstances, of which you will be duly "apprised."

On the same day, 5th September, the Appellants received another letter from the Captain, dated 9th June, thus expressed: "I have taken in estimates, and am going to heave the ship down "on Tuesday first, get new masts in her; for doing so, caulked "from copper to waterway seam, the use of the hulk with every "necessary faulds., &c., for 250 dollars—50*l.* sterling, which is ex-"ceedingly moderate, so that I shall be able to report to you every-"thing end of next week. I have been down to the wreck of the "'Mary Thomson' to examine her spars, taking the carpenter "along with me. They are all new, with the iron-work on "them, and in fine condition; they are also the exact size of "my own, both yards and masts, so that I shall meet with "quick dispatch. This is very fortunate, and I should fain "hope that the evil anticipated may turn out for your benefit.

"We could not have made money at any rate, with the "present rate of freight from Bombay. I remain, &c."

On the 4th of July the ship was surveyed by proper persons, and the extent of repair necessary ascertained.

Some time in November the Appellants received a letter from the captain, dated 5th July, intimating the survey, and that he had taken tenders for the repairs, the lowest of which would make

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them about 3000*l.* The letter thus continued:—"Now, the "ship being insured for 6000*l.*, the loss to the insurers would "have been too great for abandonment, and on that account it "could not have been effected at any consideration.

"For your interest I must raise money on bottomry. If I "was to draw on your house for the repairs, and the documents "perhaps not have come to hand, or the time that elapses ere "the insurance makes up their part of the loss, it might not "perhaps be advantageous to do so. I have already advertised "for money, payable in England, on bottomry, in prosecution "of my voyage to Bombay, to be paid on my return home, but "have not succeeded as yet. The merchants here do not like "to take bottomry on a ship that has to go to another port "beside where the bottomry is payable, the risk being so great; "I would have no difficulty in getting it, were I to go home "direct, and I think it will be more advantageous to do so. "Messrs. Hunter and Co. say that they will send their sugars "by me at the rate of freights when the sugar season com- "mences, say in about six weeks. By that time I shall be all "ready for sea. The accounts from India are very disheartening; "freight is not to be had but at a very low figure, and which "would occasion a loss to the shipowner. If I can make from "here 2500*l.* to 3000*l.* freight direct home, it will, I think, be "certainly best for your interests. I wrote Messrs. William "Nicol and Co. on my arrival here, with instructions to write "me immediately on receipt, *via* Calcutta, an answer to which I "shall shortly expect, and which will guide me in my future "operations."

On the 28th November the Appellants received a letter from the captain, dated the 10th of July, in which he informed them that he had not been able to obtain any tenders of money for the repairs otherwise than by bottomry upon the vessel, which Messrs. Hunter, Arbuthnot, and Co., had agreed to enter into, upon condition that he gave an undertaking to load the vessel

for London direct, instead of going to Bombay, his original destination. After quoting Messrs. Hunter and Co.'s letter upon the subject, his letter continued thus: "Now, in reference to "this letter, it is clearly shown that money I cannot raise on "bottomry in order to go on my intended voyage to Bombay. "If I should lay the ship on here for England, and freights may "turn out low, which, from advice from India, I have reason to "expect it will be so. (the accounts coming to hand since I "wrote you last,) there is only one alternative left me, and that "is, to try and get money by bills drawn on you for the "repairs: if this cannot be done, then we have hold of the "underwriters to pay up part of any that may occur from my "laying on here, as it is certainly better for their interest than "yours, the ship should be saved. I hand you copy of the "letter I have wrote in answer to Messrs. Hunter, Arbuthnot, "and Co., which may be useful, as we are insured in Glasgow, "and which you can show them, so that no time may be lost "when the accounts do come in for a settlement.

"'Messrs. Hunter, Arbuthnot, & Co.

"'*Mauritius, 8th July*, 1842.

"'GENTN.—I received your letter of this day's date, inform-"'ing me that no offer has been made in answer to my call for "'tenders for the loan of a sum of money sufficient to meet "'the necessary repairs of the 'William Nicol,' under my com-"'mand, to be secured by a bottomry bond upon the ship, "'payable in England, the ship to proceed to Bombay in pro-"'secution of her voyage home, and that it was necessary, "'before entering upon the repairs of the vessel, that I should "'give an engagement to the effect that, in the event of my being "'unable to raise the money for the necessary repairs, proceed-"'ing to Bombay, I will proceed to England with my ship, "'after the necessary repairs shall have been effected.

"'In reply, I beg to state there is only another way left me

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now, in order to raise money, and that is by bills on my "'owners; the reason I think so is, that, from the law of "'insurance, I am bound to use every endeavour to obtain "'money for repair,—first, on my owners; second, if this "'should fail, by a bottomry bond on my ship. If this should "'also fail, I have then no alternative left me than to lay the "'ship on for England, and if this should be the case, I shall, in "'first case, protest against such a measure, in order to take "'the responsibility off my own shoulders; and, secondly, to "'secure the interest of my owners.

"'There is one question, however, I beg the favour of an "'answer, which is this:—If the ship lay on for England, it is "'for the benefit of the underwriters, certainly not for my "'owners. Freight here just now is extremely low, and, to "'look forward to the sugar season, by all accounts, and from "'the quantity of shipping expected, I am afraid freights will "'be low then also. Now the question I wish to ask,—If the "'insurers are not entitled to bear part of the loss that may "'accrue from the ship going home direct? 2d, If I cannot "'abandon when I cannot get money, and lay the ship on for "'behalf of the insurers? This I think is a very natural plan, "'when it is for their interest alone that the ship goes home. "'Waiting for your reply, I remain, &c.

(Signed) "'WILLIAM ELDER.'"

On the 15th November the Appellants received a letter from the captain, saying, "Since writing you last, per the "'Culdee,' *we have finished all our repairs.* We have also "taken the masts out that I put in to heave the ship down, and "replaced them with two others. Our rigging is nearly fitted "for going over the mast-head, and our masts also and yards "are finished, so that we may expect to be ready soon.

"Accounts have reached here from Bombay and Calcutta up "to the 28th June. Freights are still worse, and I am still

"more inclined to wait the result of the sugar season here, in "the end of September or October, than run the risk of going "there seeking. Freights in Bombay are only 30*s.* per ton, "which must be a dead loss for the shipowner."

On the 25th November the Appellants received a letter from the captain, thus:—"I am surprised I have never received an "answer to my letter which I wrote William Nicol and Co. on "my arrival here. I am very sorry at it, as it might let me "know the particulars as regards freight, cargo, &c. The "latest accounts from Bombay that have reached here still "quote freights extremely low, 12*s.* per ton. This is indeed "sorrowful accounts, and I do think it will be better, when "fitted out, to lay the ship on for London from here; freights "just now are 3*l.* 10*s.* per ton, but none or very little of the "new sugar has come in. The season has been extremely "backward, and it will be six weeks yet before the sugar comes "in in any quantity. Freights then will depend on the quan- "tity of tonnage that will be in the harbour. At the present "moment it is very little, and I earnestly hope it will continue so.

"Messrs. Hunter and Arbuthnot say that they think they "will manage to load us with the aid of another house when the "sugar season arrives, which I hope will be the case. I do not "think it prudent to venture to Bombay in the present state of "affairs."

During this correspondence of the captain the Appellants were at the same time advised, from time to time, by Messrs. Hunter and Co., of what was going on. On the 3rd December "they acknowledged the letters of that firm, thus:—"We observe "the general measures adopted for the refit of the ship 'Wil- "liam Nicol,' which we hope may turn out to have been the "best in the unfortunate circumstances in which she was "placed, but in the absence of any past experience on our part "of the usages of your port in such cases, we were rather "startled at the apparent necessity of a bottomry bond being

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"had recourse to, and to so large an amount; but this may be "a misapprehension on our part, which the communication of "particulars hereafter may clear up.

"We notice the obstacle stated by you to the prosecution "of her voyage *viâ* India, and feel obliged by your offer to "Captain Elder of a cargo of sugar, at the first of the season, "for England direct; and should it have been decided upon to "follow this course, we hope the rate of freight will prove such "as to compensate in some measure for the loss which must "necessarily accrue from the heavy expense connected with her "repairs.

"We note your attention in the matter of insurance, which "we have duly provided for."

The last line of this letter had reference to a suggestion made by Hunter and Co., that the Appellants should insure the vessel. On the 18th of February, 1843, they accordingly effected insurance upon the homeward freight, to the amount of 1200*l.*

On the 11th of March the Appellants received a letter from Hunter and Co., saying, "We now beg to advise you that we "hope to be able to dispatch the 'William Nicol' from the "20th to the 25th proximo, with a full cargo of sugar to Lon- "don. We offered Captain Elder half a cargo, either for "Liverpool or the Clyde, but we could not succeed in procur- "ing any other freight for these ports; we have therefore "determined, at some inconvenience to ourselves, to send our "sugar to London, as we shall be able to get the 'William "Nicol' filled up for that market, at a freight of 30*s.* per ton, "and 5%; we are aware that this is a very low figure, but it is "the rate which other first-class are receiving at present; and "from the short crop of sugar this season, and the number of "unemployed vessels now in harbour, we see no prospect of any "immediate alteration taking place.

"We suppose the bond will amount to from 4,500*l.* to "5000*l.* We presume that the homeward freight will amount

"to about 1000*l.*—say 600 to 650 tons at 1*l.* 10*s.* and 5°/ ; any "passage-money we may procure will be paid here."

On the 7th March the Appellants wrote Messrs. Henderson, of London, shipowners, intimating the expected arrival of the "William Nicol," and inclosing a letter for the master, "requesting him to follow your directions as to the dock of his "discharge;" and in the inclosed letter to the master, they wrote him, "We have to request you will be guided by the direction "of our agents, Messrs. Henderson, as to the dock to which "you are to proceed for your discharge." On the 24th of March, the Appellants again wrote the captain to London, in the following terms: "We observe the arrival of the ship in the "Thames, and although without any letter by her or from you, we "think it proper not to lose a post in addressing you, as, from "the extraordinary circumstances in which the ship is placed, it "will be necessary for us to be furnished with all the particulars "by which the claim of 4,500*l.* is made up before taking the "vessel off the hands of Messrs, Hunter, Arbuthnot, and Co., "and also, seeing that the amount claimed against the ship for "repairs is greatly above her present value in the market, to "consult counsel, whether we cannot yet abandon or refuse to "take the vessel. We have written to Mr J. D. Nicol on this "subject, authorizing him to do so, and you will no doubt give "him all the information requisite to make out our case."

On the 27th of March the Appellants received another letter from Hunter and Co. informing them that the vessel was ready for sea, and that they had forwarded the bottomry bond, which amounted to 5,382*s.* 13*s.* 1*d.*, to London for payment. On the same day the vessel arrived in London.

On the 30th March the Appellants wrote the brokers, through whom the original policy of insurance had been effected, "We "beg to intimate to you that we abandon the ship 'William "Nicol' lately arrived in London, and have to request that the "underwriters will look after their interest;" which abandon-

ment they on the 7th of April extended to the freight. And on the 17th of April they again wrote them:—"With reference to "our former communications on the subject of the ship 'Wil- "liam Nicol,' we beg to intimate, that, having abandoned that "vessel as at the time she entered the Mauritius, we do not "hold ourselves responsible for the premium of insurance "upon her, or for that upon her freight from that place to "London."

Upon the vessel's arrival it was taken possession of by the agents of Hunter and Co. for payment of their bottomry bond, and sold under proceedings in the Admiralty Court for 2,516*l.* 15*s.* 2*d.*, which together with the freight from the Mauritius, likewise received by Messrs Hunter and Co., did not discharge the bond. What part of the bond was strictly applicable to repairs did not appear. But the ship-market in London was at that time in a very depressed state.

The Respondents refused to accept the abandonment of the vessel by the Appellants, but expressed their willingness to settle as for a partial loss which had been estimated, by an average stater, at 2,469*l.* 10*s.* 8*d.*

In these circumstances the Appellants brought an action against the Respondents for payment of the full sum of 6000*l.* covered by the original policy. The Respondents consigned the 2,469*l.* 10*s.* 8*d.* in Court, and pleaded in defence the circumstances which have been stated, as showing that the loss was only a partial one; that the Appellants had elected to treat it as such, and were, at all events, barred by the delay which had occurred in treating it as a total loss.

The case was sent for trial upon the following issue:—"It "being admitted that, on the 25th day of August, 1841, the "defenders granted the policy No. 98 of process, whereby the "vessel 'William Nicol,' of Glasgow, the property of the pur- "suers, was insured by the defenders against the perils therein "stated, from the 18th of August, 1841, to the 18th of August,

"1842, to the amount of the sums attached to their names "respectively therein, amounting together to the sum 5,800*l*,—

"Whether, about the months of May and June, 1842, or "one or other of the said months, and within the said period "stated in the said policy, the said vessel was totally lost; and "whether the defenders are, under the said policy, indebted and "resting-owing to the pursuers in the foresaid sums attached to "their names in the said policy respectively, with interest "thereon as libelled, or any part thereof, under deduction of "the sum of 2,469*l*. 10*s*. 8*d*.,, with interest thereon?"

On the 23rd of July 1845, the jury returned a verdict in these terms: "Find for the pursuers, with leave to the defenders "to move the Court to enter a verdict for the defenders, if the "Court shall decide in their favour on the following points, viz.—

"Whether the pursuers are barred from recovering as for a "total loss, in consequence of abandonment having been neces- "sary, and not having been made in due time, or of the pur- "suers having elected to treat the case as one of partial loss: "Subject to which questions, as questions of law, arising on "the evidence, as appearing on the Judge's notes, this verdict "is returned."

On the 5th March, 1846, the Court pronounced this interlocutor, "Find that the pursuers are barred from recovering "as for a total loss, in respect they were bound, and failed to "abandon the vessel in due time to the defenders, and also that "they elected to treat the loss as partial: Therefore, appoint "the verdict to be entered up for the defenders, subject to "ascertainment of the amount due to the pursuers as for a "partial loss: Find the defenders entitled to the expenses "applicable to the discussion of the points now decided, and "remit to the Lord Ordinary to proceed with the case in terms "of the above finding; reserving all other questions of ex- "penses."

The appeal was against this interlocutor.

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Mr. Attorney-General and *Sir F. Thesiger* for Appellants.—The question put by the issue was whether the vessel was totally lost, and the verdict finds for the pursuers. It therefore finds that there was a loss total in its nature, and that must be taken to be a fact not now to be controverted.

[*Lord Chancellor.*—The issue must be taken to assume the facts stated in the summons.

Lord Campbell.—And the verdict taking the whole together finds that there was a constructive total loss.]

We admit that. Then the verdict leaves for the consideration of the Court three questions: first, whether abandonment was necessary in order to entitle the Appellants to recover as for a total loss. Second, whether abandonment being necessary, it was made in due time; and third, whether the Appellants had in the circumstances elected to treat the loss, not as total, but as partial, and so barred themselves from a right to recover as for a total loss.

I. Loss in sea-insurance is of three kinds: total destruction of the thing insured in every sense, as where a ship founders at sea, and no part is ever seen again; second, where the thing insured is not destroyed in every sense, but only so far as to have lost the character in which it was insured, as where a ship is so damaged by storm, as, without repair, to be no longer capable of being used as a ship; when, to use an expression of *Chief Justice Abbott*, it is "a mere congeries of planks;" and third, where the thing insured is withdrawn from the power of the owner as completely as if it were destroyed, as where a ship has been captured by an enemy, or been the subject of barratry by the master.

In the first of these cases there is obviously a total loss in fact, and therefore in law. In the second the loss is total or partial, according as the thing insured may or may not have received so much damage as to make it not worth while to attempt restoring to it the character in which it was insured, as

by restoring by repair the character of a ship to that which has become a congeries of planks. In the third the thing insured is not lost in one sense, it continues in existence retaining the character in which it was insured. In another sense it is lost, to the owner at least, for it is beyond his power.

In the two first of these cases no abandonment is necessary. In the first, for the obvious reason that there is nothing existing to abandon; and in the second, because the ship, so far as the owner is concerned, is as much lost as if she were at the bottom of the sea. It is in the third case only, that of loss by capture or barratry, that abandonment is necessary, in order to show the intention of the assured to treat that as a total loss which ultimately may prove to be no loss at all. To exclude any presumption from silence that the assured meant to adhere to the adventure as their own, and show that they meant to recur to the insurance, and give up to the insurers any chance of the vessel's recovery. The present case comes within the second class, and the Court below has only found abandonment to have been necessary by confounding two things entirely different "*relinquishment*" and "*abandonment*," where the thing insured is not destroyed in every sense, but only in that sense in which it ceases to have the character in which it was insured, such parts of it as retain existence in its altered character, the salvage, must be relinquished by the assured to the insurers when they come to claim upon the policy; because the contract of insurance is one of indemnity only.

Abandonment, on the other hand, is only an intimation of intention to renounce the particular adventure, and is only necessary where the matter insured exists in specie, and is available in specie; when it is totally destroyed, or so much destroyed as to be no longer practically useful, abandonment is not necessary. This was established in Cambridge *v.* Anderton, 2 *Bar. & Cres.*, 691. In that case a vessel insured had received so much damage, that in the opinion of experienced persons,

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her value after being repaired would not be equal to the expenses of the repair, and the captain in consequence sold her as she was. There the insured were found entitled to claim as for a total loss, though they had not given any notice of abandonment, *Bayley J.* observing, that "if by means of any of the "perils insured against, the ship ceases to retain that character, "and becomes a wreck, that is, a total loss, the master may sell "her, and the assured may recover for a total loss, without giving "*any* notice of abandonment"; and *Holroyd J.* said as explicitly, "*Where* the damage sustained makes the loss a total loss, it is "*unnecessary* to give notice of abandonment." So in Roux *v.* Salvador, 3 *Bing., N. C.*, 266. There a vessel bound from Valparaiso to Bordeaux, with a cargo of hides, sprung a leak between Valparaiso and Rio Janeiro, and put into the latter port, where it was found that the hides were in an incipient state of putrefaction, from the access of the sea-water to them, and that if they should be carried on to Bordeaux, they would by the time of their arrival have ceased to exist as hides, and have become a mass of putridity. In these circumstances the captain sold the hides, and it was found by the Exchequer Chamber, correcting a previous judgment of the Court of Common Pleas, that the insured were entitled to recover as for a total loss, without the necessity of abandonment. *Lord Abinger* said the case "was not what has been called a *constructive* loss, but an absolute total loss," and referring to Mellish *v.* Andrews, 15 *East* 15., and Mullett *v.* Sheddan, 13 *East* 310, he continues "Both these cases are direct authorities that no "abandonment is necessary where there is a total loss of the "subject matter insured."

In Mellish *v.* Andrews, *Lord Ellenborough* said, "a party is "not in any case obliged to abandon, neither will the want "of abandonment oust him of his claim."

In the present case the verdict has ascertained the loss to have been a total one, so that upon the authority of these cases

there was no necessity for abandonment. At the moment the ship receives her death-blow the insured are entitled to claim the indemnity of the policy; and if the captain had sold the ship, it must be admitted, on the authority both of Cambridge *v.* Anderton, and Roux *v.* Salvador, that the Appellants would undoubtedly have been entitled to claim the sum insured. The circumstance of the captain having taken upon him to have the vessel repaired, instead of selling her, cannot alter the rights of the insured. In doing this the captain did not act as their servant or agent in particular. So soon as there was a total loss he became the agent of all concerned, to protect the property and dispose of it to greatest advantage. Whether the loss was to be considered total or partial depended not upon how the master chose to view it, nor on what he took upon him to do, but upon whether a prudent man would have expended money in the repairs, as was laid down by *Lord Tenderden* in Allen *v.* Sugrue, 8 *Bar. & Cres.*, 561. There can be no question that if there had not been any insurance here, and the owners had been at the Mauritius, they would not have ordered the repairs. No doubt, as was said by *Lord Abinger* in Roux *v.* Salvador, "the insured has always an option to claim under "the policy or not, but his abstaining from his right does not "alter the nature of it." If the loss is total in its nature, the insured may, if he choose, treat it as partial, but that is quite distinct from the necessity upon him to abandon, without which he cannot claim where the matter exists in specie, and is available or practically useful.

II. Assuming abandonment to have been necessary, notice of it did not require to be given until the party was cognisant of all the facts. When the letters intimating the loss were received by the owners the repairs had already been made, under the orders of the master, and it was beyond the power of the owners to controul them; the first letter was not received till the 5th of September, and the letter of 9th August shows that all the

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repairs had then been completed. But the letters even did not disclose the true state of the facts, for they induced the Appellants to believe that after the repairs had been executed the vessel would be of greater value than when she was insured, whereas on her arrival in the Thames much more serious repair was found to be necessary. Then it was that the owners first became acquainted with the true state of the matter, and came under the necessity of taking to the ship or abandoning her.

III. The fact of the master having made the repairs did not preclude the Appellants from abandoning, or show any intention to elect. The verdict has ascertained that the loss was total; from that time the power of the master, as such, was determined. While the master's power, as such, continues, he is agent of the owners to effect repairs upon the vessel, but they must be such as are prudent and necessary, Webster *v.* Seekamp, 4 *B. & Ald.* 352. Here the master thought it prudent to lay out more money in repairs than the vessel's value. If, therefore, a question had arisen between the owners and the shipwright, the latter must have failed, because the *onus* would have been on him to show that the owners, if present, would, as prudent men, have sanctioned the repairs. But so soon as a vessel is totally lost, the power of the master to bind the owners in regard to her is at an end. With the ability of the master to prosecute the voyage ceases his power to bind her owners in regard to it. What he thenceforth does is as agent of all parties concerned. The Appellants were not, therefore, bound by any act of the master as evidence of intention to claim, as for a partial loss. These acts were unauthorised by the Appellants, who, so soon as they were aware of the real nature of the damage the vessel had received, which they were not till she arrived in London, abandoned her, and claimed for the total loss.

The Lord Advocate and *Mr. Adolphus* for the Respondents.—Where a vessel is not actually sunk, and has received only

such damage as occurred in the present case, whether she is totally lost must depend on a variety of circumstances; the nature of the port at which she has arrived, the possibility of repairing her, the expense of repairs, and the like; for if she can be repaired and made to continue her voyage there is no total loss; the loss is only a constructive total loss, and the necessity is laid upon the insured, if they mean to deal with it as such, of showing their intention by abandoning the vessel, so as to give the insurers an opportunity to profit by the means of repair, to reduce their loss and make the best of the matter. But the correspondence shows that the Appellants dealt with the master and considered him to be acting as their agent in the making of the repairs. For they did not, upon the receipt of the first letter, repudiate what he proposed to do, and at once communicate with the Respondents, but they kept to themselves the knowledge of the injury the vessel had received, and so far from abandoning the voyage, they reinsured the vessel from the Mauritius.

It would be monstrous then, that, after having acquiesced in the very heavy repair which was made, and taken the chance of earning a profit by them, they should be able, upon finding their mistake, to turn round upon the underwriters and say they will abandon. If this might be so there was nothing, as the policy was a time one, to have hindered them from going several voyages within the period, and to have deferred claiming until the vessel came into port.

In Cambridge *v.* Anderson the loss was treated as a tota one, in which abandonment is not necessary, and it was so because the adventure was entirely at an end. Before the insured knew of the damage the vessel had been sold by the master, and the property transferred to third parties. And the same was the case in Roux *v.* Salvador, the hides were sold, and the adventure at an end before the insured knew of the damage. There was nothing in either of these cases, therefore,

to admit of an exercise of intention by the insured; they were as much deprived of the possibility of this as if the vessel in either case had gone to the bottom of the sea. The only question that could be raised was, whether the master was justified in selling, and this he was held to be in both cases: in the first, because the vessel was unable to prosecute her voyage without repair, and the expense of that would have exceeded her value after it was made; and in the other because the hides, if they had been carried further, would not have reached their destination in a form in which they could have been of any value. But in delivering the judgment of the Court in Roux *v.* Salvador, *Lord Arbinger* put the very case which has occurred here. After speaking of a total loss where the thing insured is destroyed, his Lordship continues, "But there are intermediate "cases; there may be a capture, which, though *primâ facie* a "total loss, may be followed by a recapture, which would revest "the property in the assured. There may be a forcible deten- "tion, which may speedily terminate, or may last so long as to "end in the impossibility of bringing the ship or the goods to "their destination. There may be some other peril, which "renders the ship unnavigable, without any reasonable hope of "repair, or by which the goods are partly lost, or so damaged, "that they are not worth the expense of bringing them, or "what remains of them, to their destination. In all these, or "any similar cases, if a prudent man, not insured, would decline "any further expense in prosecuting an adventure, the termina- "tion of which will probably never be successfully accom- "plished, a party insured may, for his own benefit, as well as "that of the underwriter, treat the case as one of a total loss, "and demand the full sum insured. But if he elects to do "this, as the thing insured, or a portion of it still exists, and is "vested in him, the very principle of the indemnity requires "that he should make a cession of all his right to the recovery "of it, and that, too, within a reasonable time after he receives

" the intelligence of the accident, that the underwriter may be " entitled to all the benefit of what may still be of any value; " and that he may, if he pleases, take measures at his own cost, " for realizing or increasing that value."

Both Cambridge *v.* Anderton and Roux *v.* Salvador are authorities to show that where the loss is not total, but only constructively total, the insured must abandon so as to give the insurers the benefit of working out their relief by turning to the best account, according to their judgment, whatever remains of the thing insured. In Mellish *v.* Andrews, the words of *Lord Ellenborough*, that a party was not obliged to abandon, had reference not to a *constructive* total loss, but to an *actual* total loss, which was the fact of that case, and as to which abandonment clearly is not necessary. And in Mullett *v.* Shedden, *Lord Ellenborough* said that if the saltpetre had not been unloaded and sold, but had remained in the ship and been delivered to the owner, he " should have thought there was much in the argument that in " order to make it a total loss there should have been notice of " abandonment." And in Benson *v.* Chapman, 6 *Man. & Gr.* 792, the right of the insured to recover upon an insurance of freight where the repairs of the vessel were so heavy as to exhaust her price and the freight she had earned upon the homeward voyage, was rested entirely upon his having abandoned immediately upon hearing of the disaster. That case, with the others, establishes that where the loss is a constructive total one, the insured may elect to treat it as total, but he must do so within reasonable time, and if not, then he must stand by the result.

II. and III. The time at which the insured should have abandoned, if they meant to do so, was when they first heard of the damage on the 5th September, or at all events in November, when they were informed what the probable cost of the repair would amount to. But in their letter of 3rd December they adopted what had been done, cherishing hope

of profit from the freight which had been promised, and gave no indication of any intention to abandon. It is no doubt true that at both of these periods the repairs had been already executed, but every warrantor, which an insurer is, is entitled to notice so soon as it can be given. The owners were entitled to know the state to which the vessel was reduced, but they were not entitled to speculate on which course it would be most profitable for them to follow, whether to adopt the repairs and claim for a partial loss, or to repudiate the repairs and claim for a total loss, and after having adopted the first of these courses, then to betake themselves to the other. All that they were entitled to was a reasonable time to make up their minds, 1 *Bell's Com.* 611; *Park*, 400. In Anderson *v.* Roy. Exch. Assurce. Co., 7 *East.* 38, notice of abandonment given twenty-one days after the vessel had struck on a rock and sunk with a cargo of wheat, and while it was yet doubtful whether she could be raised and the cargo saved, as was afterwards accomplished, was held to be too late to entitle the insured to claim for a total loss. And in Hunt *v.* Roy. Exch. Assur. Co., 5 *Man. & Sel.*, notice of abandonment given only six days after the insured were aware of the damage done to the vessel, was held to be too late to entitle them to claim as for a total loss.

With regard to the acts of the master, whether he acted as the agent of the insurers or insured, or of both, during the period before the arrival of his first letter intimating the loss to the insured is immaterial; because by not abandoning immediately they got that letter, they adopted his acts and made them their own. Assuredly he could not be the agent of the insurers until they had notice, and an opportunity given them to consider whether they would continue him or not; Mitchell *v.* Eadie, 1 *Durn. & Ea.*, 608.

If any doubt existed as to whether by the delay in abandoning the insured had elected to claim for a partial loss, it is removed by the terms of their own letters to the master and to

Hunter and Co., and more especially by the fact of their having insured the homeward freight, on the 28th February, five months after they first had information of the damage sustained by the vessel; this could not have been done in any other character than as owners continuing to trade with the vessel for their own interest.

LORD CHANCELLOR.—My Lords, it appears to me that in this case there are special grounds shown upon the correspondence, which are sufficient to dispose of the question without entering into any discussion as to many of the points which have been raised at the Bar, particularly as to that question which has arisen with respect to the formal abandonment, about which there is a confusion existing, arising, as I believe, more from the use of the term than from any real difference in the statements. But, at all events, in this case, it is admitted on all hands that, whether the parties were bound to give that formal notice of abandonment or not, when the facts came to their knowledge in this country, they were sufficiently informed of what had taken place to enable them, if they thought proper, to take upon themselves the chance of the benefit of retaining the ownership of the property, instead of taking the sum which was secured to them by the policy which had been effected with the underwriters upon the vessel; and if they acted upon that election, they surely could not afterwards turn round, and go against the underwriters as for a total loss.

But that applies to the question of whether there was any necessity for a formal abandonment or not. If there was any necessity for a formal abandonment, and with a full knowledge of the facts they did not make that formal abandonment, but took the property instead, they could not afterwards take the benefit of the policy as if there had been a formal abandonment. But if, on the other hand, there was no necessity for a formal abandonment, still, if they choose to lie by, and allow things to

go on as they did, they could not afterwards upon a change of circumstances, or in consequence of a better calculation, turn round, and say to the underwriters, "Now we will give you up "this property because we find we cannot turn it to the advan- "tage which we expected." The question really turns upon what the information was which was sent to them, and what their conduct was upon that information coming to them of what had taken place?

Now the first communication they had may perhaps not have been sufficient to enable them to come to any conclusion; they knew that a misfortune had occurred to the vessel, and they knew that expenses had to be incurred in respect of repairing the vessel, but they did not know to what extent.

But there is a letter which they received afterwards, which seems to me to decide the question. That letter is written by Hunter Arbuthnot and Company, at the Mauritius, and it is dated the 16th of July, 1842, and was received in this country on the 13th of November. Now there they state that "Captain "Elder is naturally anxious to follow his instructions, and pro- "ceed, when required, to Bombay; for this purpose he has "advertised for the loan of about 20,000 dollars, to be secured "by a bottomry bond on the ship which would proceed to "Bombay, in the prosecution of her voyage. No offers, how- "ever, were made on these terms, but parties are ready to "advance the money required, provided the ship proceeds to "England direct from this. Captain Elder will therefore be "obliged to deviate from his instructions, and we have offered "him a cargo of sugar at the first season for England, at the "current rate of freight, which we think is better for all parties, "than to go on to Bombay at the miserably low rate of freight "ruling in India." That letter, therefore, shows that the parties were under the necessity of borrowing upon the ship a sum equal to 20,000 dollars; and that letter they received on the 13th of November.

Then we have a letter of the assured, dated the 3rd of December, 1842. Having received information stating to what extent the expenses at the Mauritius would be carried, they write this letter: "We take advantage of the Overland Mail to "India, to acknowledge the receipt of your favour of the 10th "and 17th June, 16th July, and 10th August. We observe "the general measures adopted for the representatives of the "ship 'William Nicol,' which we hope may turn out to have "been the best, in the unfortunate circumstances in which she "was placed; but in the absence of any past experience on our "part of the usages of your port in such cases, we were rather "startled at the apparent necessity of a bottomry bond being "had recourse to; but this may be a misapprehension on our "part, which the communication of particulars hereafter may "clear up."

[*Lord Brougham.*—That is to show that they had received the letter. Now, look at the letter of the 16th of July, which says that they have advertized for the loan of 20,000 dollars.]

Lord Chancellor.—There is no doubt that they were in possession of the information. In point of fact, the answer to that particular letter shows that they were in possession of the information, stating that 20,000 dollars had been borrowed on a bottomry bond, for the expenses of the repairs of the vessel.

These parties, therefore, on the 13th of November had possession of this information, and we find them answering in those terms; and we find them afterwards, on the 7th of March, writing to Messrs R. and J. Henderson, London, "From the "advices last received by us from the agents of the ship "'William Nicol,' at Mauritius, it was expected that she "would be ready to leave that place, with a cargo of sugar for "London, about the 20th December; and as she may therefore "be looked for shortly, we inclose a few lines for Captain Elder, "requesting him to follow your directions as to the dock of his

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"discharge, to which please attend, after fixing with Mr. J. D. "Nicol what dock it will be most advisable to send him to for "that purpose. We are, dear Sirs, yours truly, John Fleming "and Co."

Now, my Lords, whether the fact of a total loss, as it is called, or such damage being incurred as would exceed the value of the ship to repair, whether that would make the captain the agent of the underwriters at all or not, or the agent for all the parties, is a matter which I do not think it necessary at present to advert to, because it is quite clear, even if it were so, that it was quite competent for the owners to continue the employment of the captain. If they thought proper to say, "We do not "treat this as a total loss, we do not treat you as our agent in "this matter of repairs, but we treat you as the person having "the authority over this property;" and if the facts had sufficiently come to their knowledge of what he was doing, and notwithstanding that, they think proper to take the property under their own direction, and to recognise his acts, can they afterwards, when a considerable time has elapsed, and the vessel has made a different voyage and obtained different freights from what they expected, turn round and say, "We no longer con- "sider this property as ours, but we will go against the under- "writers as for a total loss?" My Lords, it appears to me to be not only contrary to the common principles of justice, but contrary to all the authorities which have been referred to. And nothing has been cited at the Bar which can alter that view of the case; because, when it is said that they had not the necessary information to enable them to come to a conclusion as to whether they would treat it as a total loss or not, and when it is said that they were not aware of what species of vessel it would become, in consequence of the repairs to be done so as to enable them to elect, still if they thought proper to employ the captain as their agent in causing the repairs to be done, whether he acted judiciously or not, it is for them to suffer

the loss, and any want of judgment in their agent they must take the consequence of, and it is not to be visited upon the underwriters.

Upon these grounds, my Lords, it appears to me that the judgment of the Court below must be affirmed.

LORD BROUGHAM.—My Lords, I shall not occupy your time by saying more than that I entirely agree with the judgment of the Court below.

LORD CAMPBELL.—My Lords, I am likewise of opinion in this case, that the interlocutor ought to be affirmed upon both the grounds on which the Court proceeded. The Court proceeds by the interlocutor on two grounds, "The Lords having "heard counsel for the parties, find that the pursuers are "barred from recovering as for a total loss in respect that they "were bound and failed to abandon the vessel in due time to "the Defenders." That is the first ground; and then follows this, "and also that they elected to treat the loss as partial."

"Now, my Lords, in this case the assured, according to the finding of the jury, which I think is a very proper finding, were entitled, if they had thought fit, to treat this as a total loss, that is what we call a constructive total loss, which is as good a term as an actual total loss, and I do not see any reason why we should now alter that term. I admit that if persons uninsured under all the circumstances of the case, after the misfortune had befallen the ship, would not have repaired her, but, on the contrary, would have sold her to be broken up as useless, that is a total loss. But, my Lords, the question arises what the insured were bound to do to entitle themselves under this policy to claim as for a total loss. Now, my Lords, the ship was not submerged, she was not destroyed, she remained as a ship in specie capable of repairs, and it was for the captain to decide whether she ought to be repaired or ought not to be repaired.

That depended upon the price of materials; upon the price of labour; upon the rate at which money could be borrowed; and, upon the probability of profitably employing the ship after she had been repaired.

Now, my Lords, under these circumstances the question arises whether, when the owners of a ship so insured receive intelligence that she has suffered such misfortune as to render it inexpedient that she should be repaired, but that she is capable of being repaired, and they are informed, not that she has been sold by the captain, but that she lies in port capable of being repaired, they can claim as for a total loss, without giving notice of abandonment? My Lords, in my humble opinion, they cannot. According to all the old authorities which have been referred to, where there has been what we call a constructive total loss, it can only be turned into a total loss by giving notice of abandonment, and that is most reasonable, because, although in the judgment of the assured it may be better not to repair the vessel, yet the underwriters with greater facilities and appliances, may give instructions whereby the ship may be repaired, and, at all events, if they decide that the ship is not to be repaired, they may give directions as to how the ship is to be disposed of, and it would be an extreme hardship upon the underwriters that they should be called upon for a total loss, without having the opportunity of making the most of the ship in her disabled state.

Well, then, my Lords, according to all the authorities under such circumstances, the law of Insurance requires that the notice of abandonment should be given. And we come now to the two cases that have been cited, in both of which I myself, when at the bar, happened to be counsel, namely, Cambridge *v.* Anderton, and Roux *v.* Salvador. The Court of Queen's Bench held in Cambridge *v.* Anderton, not overturning the old authorities, but as it seems to me in accordance with them, that under the peculiar circumstances of that case a notice of aban-

donment was unnecessary. Why was it unnecessary? Because, the ship coming down the river Saint Lawrence met with a serious misfortune, and the captain thought it was so serious that the ship was not capable of being repaired, and he, in the exercise of the authority that belonged to him as master of the ship, sold the ship, and conveyed a good title to the purchaser of that ship. The assured received the intelligence of this at the same time that they received intelligence of the misfortune that had happened to the ship, and the Court decided that under those circumstances there was no occasion for a notice of abandonment; that under the circumstances it would be wholly futile. There was nothing to abandon; the ship was gone; the underwriters could not have taken possession of the ship, because it had been lawfully transferred to and purchased by other parties. Therefore, the case of Cambridge *v.* Anderton did not break in upon the old authorities.

Then we come to the case of Roux *v.* Salvador, in which Lord Chief Justice Tindal, a very great authority, said that notice of abandonment was necessary. That case came before the Court of Exchequer Chamber, and I do not think the Judges were by any means disposed, or can be supposed, to have departed from the ancient rule, because in that case the hides were so much injured that they had ceased to exist as hides; there was no annihilation of matter, because the substance would continue, but it would not continue in the shape of hides. Therefore, it was considered there that the real substance which had been insured had been destroyed, and, therefore, no notice of abandonment was necessary.

But, my Lords, in this case, the ship existed, was capable of being repaired, was repaired, received her freight, and brought home that freight to England, her port of destination. Under these circumstances when the assured heard by the intelligence they received from the captain of the misfortune that had happened to the ship (of which they were informed at

all events in the month of November), at that time in my opinion, if they wished to turn that which was a partial loss into a total loss, it was then imperative upon them to give notice of abandonment—so that the underwriters might have the opportunity of making the most of the property which had been insured, and which was in a state that would enable them to exercise an option as to repairing the vessel, or selling it. But, my Lords, there was, in point of fact, at that time, no notice of abandonment. There was no notice of abandonment till the 30th of March, 1843. On the 17th of March, the ship had actually returned, and the assured were fully aware of all the circumstances of the case, and they allowed the period to expire from the 17th or 18th of March until the 30th before they gave any notice of abandonment at all.

Under all these circumstances I am of opinion that the first ground upon which the interlocutor is rested would have been sufficient.

But I am further of opinion that on the second ground the interlocutor is well founded, and that here the assured had elected to treat the property as their own—not only had they not given notice of abandonment, but they had actually taken steps whereby they chose to treat the property as still belonging to them, and they intimated their intention to come upon the underwriters for a partial loss, taking to themselves all the advantages that might arise from the repair of the ship, and from the adventure being complete.

Now, my Lords, it is not necessary to give any decided opinion as to the power of the master under such circumstances, but I must here again remark that I should be slow to come to the conclusion that under such circumstances when the master is acting *bonâ fide* for the benefit of his owners, he has not authority to act as their agent. Under these circumstances there can be no doubt that the master thought he was doing the best for those who had employed him. There is no

doubt that under many circumstances, the master is the agent of the assured, of the underwriters, and of all parties concerned, but here he stood pledged to act as the agent of the owners, doing the best he could for their advantage, and I think it would be therefore rather dangerous to say that his authority as their agent might be questioned, and might be contradicted by shewing that in the ultimate result, on account of events posterior to the repair of the vessel, it had turned out that he had formed a wrong conclusion, and that it would have been better if they had abandoned the vessel instead of repairing it. But, my Lords, in this case it is not necessary to give any decisive opinion upon the power of the master upon that subject, because it seems to me that the authority of the master was adopted and recognised by the owners in this country. At all events as early as November, 1842, they knew perfectly well that he was repairing the ship on their account, and they knew perfectly well that he was to freight her at the Mauritius for London, and that they were to have any profit that might arise from the adventure. What do they do? Do they repudiate his authority? Nothing of the sort. Having had this full information they acquiesce in all that he does, thereby reflecting an authority upon him if he was not previously in possession of that authority.

My Lords, it seems to me therefore that they have chosen to treat this as a partial loss down to the 20th of May, 1843, and having done so it is much too late now to turn round and say, "This is not a partial loss, but a total loss, and "we will come here as for the whole sum of 6000*l.*" for which the vessel was insured. Under these circumstances I entirely agree with the opinio nof the learned Judges who decided this case in the Court below, and I also concur in the advice offered to your Lordships by my noble and learned friend, the Lord Chancellor, that this appeal should be dismissed, and with costs.

FLEMING *v.* SMITH.—18th April, 1848.

Ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed. And it is further Ordered, That the Appellants do pay or cause to be paid to the Respondents the costs incurred in respect of the said Appeal, the amount thereof to be certified by the Clerk Assistant, &c.

[HEARD 12*th*—JUDGMENT 22*nd February*, 1849.]

ALEXANDER CRAIG, Merchant in Edinburgh, and Others, Members of the London, Leith, Edinburgh, and Glasgow, Shipping Company, *Appellants.*

JOHN DUFFY AND CO., Shipbuilders in Aberdeen, *Respondents.*

Jurisdiction —Appeal.—After an interlocutor remitting a cause to be tried by a jury, the Court of Session, as such, ceases to have jurisdiction to try it under its ordinary powers upon a re-remit—and subsequent proceedings before the Court, had by consent of the parties under such a re-remit, are extra-judicial, and such as cannot be the subject of appeal.

THIS appeal arose out of an action brought in the year 1833, by the Appellants against the Respondents for breach of contract and for damages arising out of the defective construction of a steam-engine, which the Respondents had supplied for one of the vessels of the Appellants.

After a record had been duly made up, an interlocutor was pronounced by the Court on the 19th February, 1835, in these terms:—"The Lords appoint this cause to be tried by a special "jury, and that rules be issued for that purpose in common "form." An issue was subsequently prepared, which came on for trial before a jury upon the 17th of March, 1835. Upon that day, on the suggestion of the Judge before whom the issue was about to be tried, that, from the nature of the case, and the evidence to be adduced, the rights of the parties would be more satisfactorily ascertained by a proof upon commission, than by a jury trial, the parties consented to the cause being sent back to the Court of Session to be tried in the form sug-

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gested. In consequence, on the 17th of March, 1835, an interlocutor was pronounced in these terms,—"Of consent remits "these cases to the Court of Session, that a proof may be there "taken on commission, and the cases there disposed of. And "further, of consent appoints the Solicitor-General, whom "failing, James Ivory, Esq., Advocate, with power to him to "act in the absence of the Solicitor-General as Commissioner, "to take the said proof."

After this very elaborate proceedings by proof upon commission took place, which resulted in an interlocutor finding the Respondents liable in certain items of damage claimed from them by the Appellants, and assoilzieing them from others. Against this interlocutor the appeal was taken.

Mr. Bethel and *Mr. Gordon* for the Appellants, and *Mr. Wortley* and *Mr. Anderson* for the Respondents, argued the case at great length upon the merits, but as these did not involve any question of law they do not require notice. The case is only valuable because of the objection to the competency of the appeal, which was taken for the first time at the hearing, upon the ground that the cause having been remitted to the Jury Court for trial by jury, the Court of Session had no power to determine it under their ordinary jurisdiction —that the remit for trial by jury was final, and by the statutes could neither be reclaimed against, nor appealed from; and that all the proceedings of the Court after the remit were therefore *coram non judice*, and could not be reviewed.

Although the Peers who spoke at delivering the judgment of the House, did, in consideration to the Appellants for the protracted litigation and serious expense which had been incurred, extend their observations to the merits of the case, and express their opinion that the judgment below was in that respect well founded, the judgment of the House was confined to the objection upon the competency.

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LORD CHANCELLOR.—My Lords, this case comes before your Lordships under circumstances of extreme difficulty upon the question of fact, if we were to enter into the details of the evidence upon the matter in contest between the parties. The question is, whether a certain steam-engine, fitted to a steam-vessel many years ago, was, or was not such as is described in the contract, under which it was provided; the contract being that the steam-engine should be supplied by the manufacturer—that it should be used for six months—and that if it appeared to be defective from any cause, not arising from accident, during the course of those six months the manufacturer should be liable to make it good. And the contest between the parties is, whether the steam-engine which was certainly defective at the end of the six months, was so at the time it was furnished, or whether it had become so from certain accidents or mismanagement, as is alleged, which happened to the vessel in the course of those six months' working, and the question principally turns upon whether a certain crack in the cylinder, which appears to have been repaired, was a crack which was occasioned from the original formation of the cylinder, or whether it arose from the ship having been permitted to lie in an improper berth in Leith harbour; a matter of inquiry upon which it is not very easy for your Lordships to come to a very satisfactory conclusion at a distance of twelve or fifteen years.

Now, my Lords, this was beyond all question a matter for immediate investigation, and immediate investigation before a jury, and if it had occurred in this country it would have been disposed of in the course of a few months; and if it had been properly dealt with in Scotland, it would have been disposed of in an equally short space of time. Unfortunately, however, the parties thought proper to retire from the proper tribunal for the trial of the case; they came to the Court of Session, and the Court of Session pronounced an interlocutor upon

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it, no doubt from supposed kindness to the parties; whether in the result it has proved so may be a matter of doubt, for instead of a litigation for a few months, there has been a litigation for a number of years, and at present the parties seem to be as dissatisfied with the adjudication, notwithstanding all the expense they have incurred during that period, as any parties can well be.

My Lords, the course the matter took was this:—On the 19th February, 1835, (we are now considering the question in 1849) this interlocutor was pronounced. "The Lords appoint "this cause to be tried by a special jury, and that rules be "issued for that purpose in common form." That was undoubtedly the proper order to be made by the Court; and that by the statute was final; neither party could complain, neither party could call in question the propriety of that order. It was final between the parties; and that interlocutor now stands as the order of the Court of Session. Subsequently on the 17th of March, in the same year, this interlocutor was pronounced:—"Of "consent remits these cases to the Court of Session, that a proof "may there be taken on commission, and the cases there "disposed of." The parties, therefore, consented to withdraw this matter from the investigation of a jury, and agreed that it should be disposed of in the Court of Session. The Court of Session were not bound of course to make any such interlocutor, but the Court of Session, out of supposed kindness to the parties, consented to investigate the matter, and this has led to the unfortunate litigation which has ensued.

Now, my Lords, the question arises on this appeal, whether after the interlocutor withdrawing the case from its proper jurisdiction, fixed as that proper jurisdiction was by the interlocutor of 19th February, 1835, under the authority of Acts of Parliament, it was at all competent for the parties to withdraw the case from that jurisdiction, so as to leave it in their power to come here. They might, no doubt, by consent, withdraw the

case, in order to refer it to anybody else, to any arbitrator, or to the Court of Session, if the Court of Session were willing to agree to that; but, the question that we have to consider is, whether it was competent for the parties so to withdraw the case from investigation before a jury and obtain a remit of it to the Court of Session, as to give either party a right to appeal to this House from the decision of that tribunal, not the proper tribunal according to law to dispose of the case, but the tribunal which by their mutual consent they had selected for the purpose.

Now, it was admitted—indeed it cannot be disputed—that if this had been one of the cases which the statute has expressly said should go to a jury trial, the parties could not have come here. They might have consented not to go before a jury, but if they had done so, they must have abided by the decision of the tribunal they had selected; and if the Court of Session had happened to be the tribunal that they had selected, they could not have come here to appeal, from the interlocutor of that tribunal not being the tribunal according to law to decide the case, but a tribunal which derived the whole of its authority from the consent of the parties.

The first question we have to consider is, wheher this case differs at all from the cases referred to in the statute. The statute says that certain cases shall go, without either the option of either of the parties or of the Court, to a jury trial; and with regard to other cases, it gives a power to the Court to send them there. But what does the Act say with respect to that power? The 55 Geo. III., chap. 42, sec. 4, says, "It shall not be competent either by reclaiming petition or "appeal to the House of Lords, to question any interlocutor "granting or refusing such trial by jury." The 59 Geo. III., chap. 35, sec. 15, says, "It shall not be competent by represen-"tation, reclaiming petition, bill of advocation, appeal to the

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" House of Lords, or otherwise to bring under review any " interlocutor by the said divisions, Lords Ordinary, or Judge " of the Admiralty ordering a trial by jury." The moment the Court had pronounced the interlocutor referring the matter to a jury, was there not a parliamentary direction that that should be the tribunal, and the only tribunal, to dispose of the case? Neither party had a right to complain, neither party had a right to appeal; the order is final between the parties, and though they may consent to take the decision of the Court of Session, as a matter of consent between them, they cannot give the Court a jurisdiction which it had not originally, independently of that interlocutor, which being made under the authority of the Act of Parliament, is, by that very Act made final and conclusive as to that point. Then there is, with regard to that interlocutor, a parliamentary enactment that after the matter is sent by the Court to a jury, it shall go before the jury, and that the order directing it to go before a jury, shall not be a matter of appeal or complaint. Is not this case so circumstanced, and does not it stand precisely in the same position as the cases do which are specifically named in the Act of Parliament as matters which must be tried before a jury? What is the difference between the cases? The moment the interlocutor is pronounced, both matters stand as matters which must be tried before a jury. If it is not disputed that those cases which are specifically named in the Act, must be so tried and cannot be matter of appeal—how can this be matter of appeal?

My Lords, this is a very important point. The effect of the proceeding is, to bring to the bar of this House, matters which this House is by no means competent to deal with—matters of fact after the lapse of a great many years, and which the Act of Parliament has expressly said are matters which ought not to come under investigation by way of appeal, but ought to be concluded by the jurisdiction appointed to try them—the object

of the Act being to take from this House a difficult investigation on matters of fact, which this House could not satisfactorily dispose of.

Upon that ground alone I should certainly be of opinion, and am now distinctly of opinion, that this is an appeal which this House ought not to entertain.

LORD CAMPBELL.—My Lords, I agree with my noble and learned friend, that your Lordships have no jurisdiction over this case as a Court of Appeal. It seems to me that the Lords of Council and Session, when they undertook to investigate the merits of this case, were merely private arbitrators; they were the Judges selected by the parties, and the parties virtually agreed that they would be satisfied with the decision to which they might come. An order was made that the case should be sent to a jury. Under those circumstances the case stands precisely in the same position as if it had been one of the enumerated cases that must be referred to a jury. The parties might by consent have set aside that interlocutor, and have restored things to the same situation they were in before the interlocutor was pronounced. But we have not now to consider that, for the interlocutor never was set aside. It now stands without any question ever having been made respecting it. That being so, by the statute a jury was the only tribunal to which this case could be referred, and the course adopted at the trial is very much to be regretted; indeed, I cannot sufficiently express my surprise at the course that was adopted. This might be a difficult case from the great length of the investigation, and the number of witnesses to be examined, and the accounts to be investigated, for a jury to determine; but if it was not fit for a jury to determine, it was wholly unfit for the Judges of the Court of Session to determine it, and the proper course would have been to refer it to one single engineer, who, by examining witnesses, would have come to a right conclusion

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in the course of forty-eight hours. Instead, however, of doing that, they agree to take the evidence in writing, and to refer it to the Court as a jury, and it is most lamentable the consequences that have ensued.

My Lords, my humble opinion is that the Court, as the Court of Session, had no jurisdiction over this case; that they were merely private arbitrators; and that as no corruption is imputed to the arbitrators, and nothing at all is brought forward which would set aside the award, their award is final.

LORD BROUGHAM.—My Lords, not having been present during the argument in this case, of course I can take no part in the decision which relates to the merits, but which indeed are not now before us, because we dispose of the case upon the ground of jurisdiction. But my noble and learned friends having wished me to look into the matter with a view to the very important point of jurisdiction as affecting future cases, I have considered it with all the attention I have been able to give to it, and I have no doubt whatever, that taking the two Acts together, this case is withdrawn from our jurisdiction by the interlocutor which has been pronounced; that though this is not among the enumerated cases, where there is no option given to the parties, but where the case must at all events go before a jury, this, like an unenumerated case being by the interlocutor sent to a jury, does by force of that interlocutor, stand in the same position as an enumerated case, and consequently is withdrawn from all other jurisdictions.

My Lords, I really can have no hesitation whatever in saying that this case, unfortunate as it is in its consequences to the parties, would be still more unfortunate to the Legislature, to the judicature of the country, and to your Lordships' House, if it should be followed by other cases of a like miscarriage in the Court below, because it really does amount to this, to enabling parties, no doubt under the authority of the Court, to get

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rid of a plain statutory provision, to get rid of a most important Act of Parliament, and to bring cases to this House which were positively meant to be excluded from its cognizance. I therefore can have no doubt whatever that there has been a miscarriage in considering this as a question subject to our jurisdiction as a Court of Appeal.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors so far as therein complained of be affirmed, with costs.

RICHARDSON, CONNEL, and LOCH—D. E. FORBES, *Agents.*

[HEARD 19*th*—JUDGMENT 22*nd February*, 1849.]

JOHN BAIN, residing at Moriston, and Others, *Appellants.*

THE REV. DR. WILLIAM BLACK, Minister of the Barony Parish of Glasgow, and Others, *Respondents.*

Society-Trust.—Individual members of a society, who have contributed towards its funds for the accomplishment of a certain public object, are not entitled to have the society dissolved and its property realized and divided among the members upon proof of greater or less improbability of the general object being accomplished—they must shew that the object cannot by possibility be accomplished.

IN the month of May, 1833, the General Assembly of the Church of Scotland appointed a committee of its body to consider the means which could "promote more effectually the "spiritual edification of the people, and increase the comfort "and usefulness of ministers of Chapels of Ease."

Shortly afterwards, the Assembly passed an Act that the districts provided with churches under the provisions of the Acts of Parliament, 4 Geo. IV. c. 79, and 5 Geo. IV. c. 90. should be thenceforth separate parishes, *quoad sacra*, disjoined from the parishes of which they had constituted parts, and that the ministers of these new parishes should enjoy the status and all the rights and powers of parish ministers.

In the month of April of the following year, printed "pro-"posals" for the building of twenty new churches within the city and suburbs of Glasgow, were circulated by a body of private individuals in that city. These proposals were accompanied by a subscription list, which repeated the terms of the "proposals," and contained likewise the conditions upon which the proposed new churches were to be built and endowed, and

by another paper which was entitled "The Constitution of the "Society."

At the time at which these papers were issued two obstacles presented themselves to the accomplishment of what they were intended to effect. The first was a doubt of the competency of the Church Courts to erect churches built by voluntary subscription, and a district annexed to them into parishes; and a second existed in the circumstance that the right of patronage of the new churches would by law belong to the patron of the already existing parishes, within which the new churches might be erected.

The first of these obstacles was obviated by proceedings adopted by the General Assembly, which on the 31st May, 1834, passed an Act by which it declared, "That all ministers "already inducted and settled, or who shall hereafter be in- "ducted and settled, as ministers of chapels of ease, presently "erected and established, or which shall be hereafter erected "and established, in terms of the Act anent chapels of ease, of "1798, or prior thereto, by authority of the General Assembly, "or by the Presbyteries of the bounds, are, and shall be, con- "stituent members of the Presbyteries and Synods within whose "bounds the said chapels are or shall be respectively situated, "and eligible to sit in the General Assembly; and shall enjoy "every privilege as fully and freely, and with equal powers, with "parish ministers of this church; hereby enjoining and requiring "all Presbyteries, Synods, Church Courts, and Judicatories, "within whose bounds the said chapels are, or shall be situated, "to receive and enrol the said ministers as members thereof, and "put them in all respects on a footing of Presbyterian equality "with the parish ministers of this church; giving, granting, and "committing to the said ministers the like powers and authority "and privileges now pertaining to ministers of this church, "within their respective bounds. And, further, the General "Assembly did, and hereby do, remit to the Presbyteries within

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"whose bounds the said chapels now established are situated, "to allot and assign to each of the said chapels a territorial dis- "trict, and to erect such districts into separate parishes *quoad* "*sacra*, and to disjoin the same *quoad sacra* from the parishes "whereof they at present form parts; and also to take the "necessary measures for selecting and ordaining, according to "the rules of the Church, for each of the said districts so to "be erected, a body of elders who, with the said ministers re- "spectively, may exercise sessional jurisdiction within the "same. And the Assembly instruct Presbyteries to be cau- "tious not to assign a more populous district than it seems "possible to attend to; provided always, that it shall be un- "derstood that the chapels to be erected into parishes shall "first have been constituted according to the laws of this Church, "for which purpose it will be open to chapels to apply, if not "so constituted already."

And the second obstacle was thought to be overcome by an Act of Parliament (Colquhoun's Act), entitled "An Act to "regulate the Appointment of Ministers to Churches in Scot- "land, erected by Voluntary Contributions," which was pro- cured to be passed in the month of July, 1834, and by which it was enacted *inter alia*, "That where any church, chapel, or "other place of worship in Scotland, built or acquired and "endowed by voluntary contribution, shall, according to the "provisions of the existing law, be erected into a parochial "church, either as an additional church within a parish already "provided with a parochial church, or as the church of a sepa- "rate parish to be erected out of a part or parts of any existing "parish or parishes, whether the same be established and erected "merely *quoad spiritualia* by the authority of the Church Courts "of the established Church of Scotland, or also *quoad tem-* "*poralia* by authority of the Lords of Council and Session as "Commissioners of Teinds, neither the King's Majesty, nor "any private person, nor any body-politic or corporate, having

" right to the patronage of the parish or parishes within which " such additional churches shall be established, or out of which " such new parishes shall be erected, shall have any claim, right, " or title whatsoever to the patronage of such newly-established " churches or newly-erected parishes; but the appointment of " ministers thereto shall be made according to the manner and " subject to the conditions which shall be or have been pre- " scribed by the said Church Courts, subject always to such " alterations as shall be made by them, according to the laws of " the Church from time to time: Provided also, that nothing " herein contained shall be construed to limit or affect the " powers of the Commissioners of Teinds exercised under and " according to the provisions of the Act of the Scottish Par- " liament, sixth of Queen Anne, c. 9, intituled *An Act anent* " *the plantation of Kirks and Valuation of Teinds.*" And by an Act of the General Assembly passed in the same year for regulating the call of ministers to churches, and generally known as the " Veto Act."

These proceedings of the Legislature and of the Church Assembly gave such a stimulus to the project of Church extension, which had been mooted by the circulation of the papers which have been mentioned in the early part of the year 1834, that between that time and the month of October of the same year a sum of 20,000*l.* had been subscribed for carrying out the project.

In the month of July, 1835, a printed paper, entitled " First " Annual Report of the Society for erecting additional Parochial " Churches in Glasgow and Suburbs," was circulated among the persons who had subscribed towards that object, but who had not as yet been in fact constituted into a society. Shortly afterwards that step was taken, and the society was formed under the title of " The Society for Erecting Additional Parochial Churches in " Glasgow and Suburbs," the object and constitution of which were regulated in conformity with the proposals and conditions

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which have been mentioned as having been circulated in 1834. The office-bearers appointed by this Society got in from the subscribers the amount of their subscriptions, and by this and other means realized a sum amounting to upwards of 40,000*l.* —26,419*l.* of this sum was contributed by members of the society—the rest was obtained partly by additional subscriptions from individuals whose names were communicated—partly by promiscuous contributions at the doors of different churches, the donors of which were necessarily unknown—partly in the shape of drawbacks allowed by Government on the duty payable on the wood and other articles used by the society—and partly by a contribution from a committee of the General Assembly of the Church on Church Extension.

With the funds so raised, the society built fifteen churches within the city and suburbs of Glasgow. The titles of these churches were taken to members of the society as trustees for purposes which were very fully disclosed in the deeds.

The General Assembly then gave each of these churches a constitution which set forth the terms upon which they were to be held, and the purposes to which they were to be applied.

Afterwards the enactments of the General Assembly in regard to chapels of ease were acted upon by the inferior church judicatories in regard to the churches erected by the society, by enrolling the ministers appointed to them as members of the Presbyteries and Synods within whose bounds the respective churches were erected; by assigning districts or parishes *quoad sacra* to them; and by appointing separate Kirk Sessions.

But while the churches had been thus erected, and put into a condition for use, sufficient funds had not been procured for the endowment of clergymen to serve in them; for this purpose a sum nearly equal to 50,000*l.* beyond what had been raised by the society, would have been necessary.

After all this had been done, the Court of Session decided in a case which arose before it in regard to the Parish of Stew-

arton, that the Church Courts had no power by law to erect new parishes *quoad sacra*, or in any way to alter or infringe the state of the existing parishes at the time at which the Act of the Assembly of 1834 was passed. In another case with regard to the Parish of Brechin, the same Court found that no collections can be made under the authority of the Church Courts at any place of worship which is not an ordinary parish church, and that all collections so made must be applied to the purposes for which collections made at parish churches are by law applicable. And in several other cases the Court of Session found that the Church Courts had no power to enforce the Act of Assembly in regard to calls or the "Veto Act," but were subject in the admission and deposition of ministers to the control of the Court of Session, in so far as their proceedings in these respects might be contrary to law.

The consequence of these various decisions was a necessity, recognised by the Church Courts, of retracing the steps which had been taken in regard to the erection of new parishes. Accordingly in the month of May, 1843, the General Assembly by two several Acts rescinded the Acts which had been passed by them in regard to the erection of new parishes *quoad sacra*, and the calling of ministers.

These decisions of the Court of Session, some of which were affirmed by the House of Lords, were followed by a disruption of the Church of Scotland, and the separation from it of a large body of communicants, who formed for themselves a new Church, which they called the "Free Church."

In the year 1844 the Appellants, members of the society which has been mentioned, who had contributed 16,461*l.* of the aggregate sum of 26,419*l.*, which had been paid by the whole body of the members, raised a summons in the Court of Session, against a variety of persons designated as being "the remanent "members of the said society other than the Pursuers," and against other persons described as the Acting Committee of the

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General Assembly of the Established Church on Church Extension, as representing the Committee by which the contribution towards the erection of the places of worship had been made. This summons narrated what has been detailed, and set forth that the General Assembly of the Church, by its proceedings in the year 1834, held out and represented to the members of the Church, that the fundamental principle that no pastor be intruded into any congregation contrary to the will of the people, the disjunction and erection of parishes *quoad sacra*, the constitution of additional Kirk Sessions, and the establishment of new pastoral charges, and the admission of ministers thereof as constituent members of church judicatories, and the placing them in all respects on a footing of Presbyterian equality with the ordinary parish ministers of the Church, by the sole authority of the Church and judicatories thereof, without the intervention of any secular Court, were in full accordance with the law and constitution of the Church of Scotland; that being anxious to promote the religious interests of the population of the city of Glasgow and suburbs, by means of the erection of places of worship, and relying on the assurance held out by the proceedings of the General Assembly, the Appellants adopted the measures which have been mentioned for the erection of places of worship, "That in the state in which the affairs of the said "places of worship are now placed, and the trusts constituted "by the dispositions, feu-contracts, ground-annuals, and infeftments herein before recited, being no longer explicable, or "capable of being carried into effect, according to the terms "and provisions thereof, and according to the intentions and "purposes of the several contributors to the erection of the "said places of worship, and for which the society aforesaid "was formed, the said trusts ought to be brought to an end, "and the said places of worship, free from the conditions "thereof, disposed of in the manner most beneficial for the "contributors foresaid, with the view of restoring to them their

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"several contributions, or such portion thereof as the value of the "said places of worship, under deduction of the debt aforesaid, "will provide." The summons therefore concluded to have it found, "That the said several places of worship cannot, in con- "formity with the conditions on which they were erected, and "the purposes and intentions of their erection, and the objects "for which the society, by whom they were erected, was "formed, and without violating the same, be used and em- "ployed as chapels of ease, in connection with the Established "Church, on the footing on which chapels of ease, in such "connection, now stand by law: And that the several trusts, "respectively created by the dispositions, feu-contracts, ground- "annuals, respectively herein before recited, and infeftments "thereon, of the said several places of worship above mentioned, "and the several pieces of ground whereon the same are res- "pectively erected, cannot now be explicated or carried into "execution, according to the terms and provisions therein con- "tained, or according to the purposes and intentions of the "several contributors of the sums of money for the erection of "the said places of worship, or the objects for which the society, "by whom they were erected, was formed, and that the said "trusts ought to be brought to an end, and the said several "places of worship, and the pieces of ground whereon they are "respectively erected, sold, and the prices, after paying the "expenses of the sale, and the debts of the said society, divided "among the several contributors, in proportion to the amount "of their respective contributions:" And that the surviving trust disponees of the places of worship were entitled to expose them to sale, and to convey them to the purchasers, and to apply the proceeds in discharge of the debts owing by the society, and to divide the residue among the Appellants, and the other contributors to the erection of the said places of worship in proportion to the amount of their respective contributions.

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Intimation of this action was ordered to be made to the officers of State, but no appearance was made for them, and a preliminary defence on this ground was not further insisted on.

On the 1st November, 1845, the Lord Ordinary (Robertson) pronounced this interlocutor,—"Finds that the churches in "question are declared to be held in trust, as places of worship "in connection with the Established Church of Scotland: Finds, "that there is no evidence of the subscriptions having been "made for the building of the said churches, on the faith that "parishes should be erected by a power erroneously supposed "to be inherent in the General Assembly alone, and not "otherwise, and according to law: Finds, that there is no suffi-"cient ground for maintaining that the trusts cannot be expli-"cated, or carried into execution, according to the terms and "provisions thereof, or according to the expressed objects and "intention of the contributors, as stipulated by them; and "therefore finds, that the pursuers have no right to insist upon "the said churches being sold and the free proceeds thereof "divided among the contributors. Sustains the defences; as-"soilzies the defenders; and decerns:"

On the 17th November, 1846, the Court adhered to this interlocutor. These interlocutors were the subjects of the Appeal. The greater part of the argument of counsel upon the hearing, was a critical examination of the terms of the different documents which had preceded and followed the formation of the Society with a view to discover its object, whether Church extension generally with parochial ministration as an incident of it, or parochial ministration with Church accommodation merely as an incident of that. But as no general principle can arise from that discussion, it will scarcely be further noticed.

Mr. Rolt and *Mr. Dunlop* for the Appellants. In England it is only by a strained and very extreme rule of construction that the doctrine of Cypres has been introduced to prevent gifts

to charity from failing. But even in England with that doctrine prevailing, if a condition be annexed to a gift, the condition receives effect, and if it fail, the gift returns to the donor. But in Scotland the doctrine of Cypres in regard to charity, is altogether unknown, there if the purpose for which a gift was devoted cannot be attained it may be resumed. And both in England and in Scotland, if a body of persons form themselves into a society for the attainment of an object which proves in the end to be unattainable, the members are entitled to insist upon a dissolution of the society, and the distribution of its funds.

Such being undoubtedly the law, what was the object of the society in the present case? Church accommodation, no doubt; but Church accommodation attended with extension of the parochial system, and all its machinery for proper and effective ministration. Ministers of chapels of ease, have, by the law of the Church, no jurisdiction in ecclesiastical discipline among the members of their congregation; they are merely teachers of those who sit under their ministry. They have no power as to communication or excommunication, and no right to sit as members of the Presbytery, Synod, or General Assembly; nor are they, in short, in that position which, in the opinion of divines, can be relied on for the proper diffusion of religious instruction. This defect in their position was supposed to have been remedied by the Act of Assembly of 1834, which placed ministers of chapels of ease on the same footing with parish ministers. The operation of that Act, coupled with the Act of Parliament, 4 and 5 William IV., cap. 14, which took away the right of the patron of existing parishes to the patronage of churches erected by voluntary contribution, seemed to offer an opportunity for extending the parochial system in large towns, such as Glasgow. It was the contemplation of accomplishing this great object that gave rise to the formation of the society of which the Appellants became members. All the documents from the original proposals to the titles of the churches show

that the erection of *parish churches*, not *chapels of ease*, was what was desired. If the churches erected by the society cannot be erected into parishes, then they cease to be of that use and benefit which alone induced the Appellants to come forward with money for their erection. They will no doubt afford increased means of accommodation for those disposed to attend divine worship; but they will not afford opportunities for that private ministration which parochial pastors are so eminently esteemed for. Now that the Act of Assembly has been rescinded, and rescinded because the Courts of Law have decided that what it was intended to accomplish is illegal, it is no longer possible for the society to attain the object for which it was formed.

The formation of the churches built by the society into parishes can now only be achieved by an application to the Court of Commission of Teinds under the Act 1707, cap. 9. By that Act, the consent of three-fourths of the heritors of the parish from which the disjunction is to be made, is requisite, and the practice of the Court, though not prescribed by the statute, has been to require provision of a stipend of not less than 150*l.* for the minister of the proposed parish. Admitting it to be possible to obtain the requisite consent for the disjunction, there is no probability of the society being able to make the necessary provision for the minister. For this purpose a sum of not less than 50,000*l.* for the whole fifteen churches would be necessary. What probability is there that such a sum could be raised, when the utmost exertion in the prospect of the Society's scheme being worked out by itself, as originally contemplated, has failed in raising more than sufficient money to build the churches? But assuming that a sum sufficient for the endowment of the clergymen could be raised in time, the Church of Scotland has already, since the disruption of the Free Church, more churches within the city of Glasgow and suburbs than it has members to occupy. There is no reasonable probability,

therefore, that the Court of Commission of Teinds, if applied to for the erection of these churches into new parishes, would, in the exercise of the discretion with which they are bound to regulate their procedure, grant the application, whatever may be the wants of the community apart from those of the Church itself.

If then the creation of the churches, built by the society, into parish churches, be an improbability amounting almost to an impossibility, the trust cannot be allowed to remain where it is. Something further must be done to prevent the churches falling to decay, and the property in them becoming valueless.

Mr. Bethel, *Mr. Wortley*, and *Mr. Gordon*, for the Respondents.

LORD CHANCELLOR.—My Lords, this case is no doubt one of very great importance, involving a question extremely difficult of solution. Many years ago, (the precise date of the commencement of the subscriptions does not appear), but in 1834 the pursuers met and formed themselves into a society for certain purposes, which I shall feel it my duty to investigate in detail.

The ground upon which they institute the present proceedings is, that the object for which the parties subscribed their money has entirely failed; so entirely failed, that the object of the subscriptions no longer exists, and that therefore they are entitled to have their money realized which was so subscribed, and which had become the property of the society to which they gave ther subscriptions; that they are entitled to have their subscription-money returned, or at least to participate in the proceeds which may be realized by the sale of the property.

Now, my Lords, this society was not only formed by sub-

scription; the fund sought to be provided was not a fund entirely raised by money coming from various subscribers, but part of it was contributed by Government in the remission of dues to a very considerable amount—about 3000*l.*, which would otherwise have fallen into the Treasury, which were remitted for the purpose of assisting the society. And part of the money was contributed by subscriptions from public bodies, and part by subscriptions at the church doors; by persons, therefore, who cannot be ascertained, and to whom it is impossible that any portion of the money can be returned. These are difficulties which would have been to be considered, if the facts of the case were such as, in the opinion of this House, would call upon the House to consider how the decision to which they might come in favour of the pursuers was to be carried into effect.

It appears to me to be full of difficulty. I need not do more than state this, in order to show how extremely difficult it would be to carry into effect the relief which the pursuers think they are entitled to. In this country a case of this sort has not, that I am aware of, arisen. Many cases have arisen in which societies have been formed entirely by subscriptions, and by monies advanced, and in which the object sought for could not be obtained; and then the question has arisen as to the means by which the property so collected, could most fairly and properly be re-distributed amongst those from whom it had come, and it has been found that the existing establishments of this country were totally inadequate to perform that duty, and Acts of Parliament have therefore passed for the purpose of establishing machinery peculiar to each case, and with a view to do that which the regular proceedings in our Courts were found totally inefficient to accomplish. Whether better means exist in the Court of Session it is not necessary now to enquire. I only mention it in the commencement of my observations in order to show how extremely difficult it would be to do justice

to the parties, if this case were one for the interposition of the Court at all.

But, it is quite clear that before any parties so subscribing can ask for the interposition of the Court with the views that these parties profess, they must first of all show that the purpose for which they subscribed was of a certain character, and that that purpose so ascertained cannot be carried into effect. Here, the proposition that the pursuers start with is, that the object of the subscription (and when I say the object, I mean the leading object, the purpose which they had in their minds at the time they parted with their money—that which induced them to part with their money) was to establish in Glasgow twenty new and entirely distinct parishes, that is to say, taking the existing parishes of large dimensions, that they should be sub-divided into other parishes of certain smaller dimensions, and that each of those sub-divided districts should be an entire and perfect parish of itself; that that was the object they had in view; that if that object of the subscription fails, they have parted with their money in expectation of that which cannot be realized, and therefore they ask to have it returned. If they established that to be the object of the subscription, and that which induced them to give their money by way of subscription, they then would have to show that that purpose cannot be carried into effect, that it altogether and entirely fails, and therefore a case has arisen in which they are entitled to have the money returned.

After a very careful perusal of the circumstances of the case as they are to be found in the papers, it appears to me that the pursuers fail in establishing both these propositions. It is quite clear that the leading object, (and it is most important to distinguish the main or leading object from any subordinate object, or purpose, or means, by which that proposed charity was to be carried into effect) the main and leading object, that which induced the parties to form the society, and induced the

subscribers to it to part with their money, was that there might be more church accommodation for the instruction of the people of Glasgow, and that that should be effected by the establishment of other churches in connection with the Established Church of Scotland. Beyond all doubt it formed part of the scheme, it was that which the parties also wished, that it should not be confined merely to church accommodation, not merely to the opening of new churches to facilitate the attendance of the public at public worship, but that there should be districts assigned to the new churches, and that those districts should be put under the control and jurisdiction of the ecclesiastical ministers and elders, in order not only that there might be accommodation for the parties if they did attend, but that there might be that species of private and individual superintendence by the pastor over the flock, that would induce them to go to a place of public worship. Now, it may be perfectly true that in contemplating the means by which this leading object was to be carried into effect, they did contemplate the establishment of distinct parishes; but to say that that was the object, the main object they had in view, that which induced the parties to subscribe their money, does seem to me to be confounding the means by which the object was to be carried into effect, with the object itself.

I think it appears hardly necessary, nor would it be convenient to go in detail through the various documents from whence this is to be ascertained. I find it in the proposals; I find it in the conditions; and I find it, in short, in every document which has been produced; from all these it appears to me to be quite clear that what I have now described, was the leading, main, and principal object, and that which induced the formation of the society, and that the other object was subordinate to that, and that the intention of the parties was that their leading object should be attained, if not precisely by the means contemplated, at least under circumstances which would

give to the parishes, if not quite all, at any rate a very large portion, of that benefit which those who subscribed to the society intended to give. It is perfectly competent, as the law of Scotland now stands, (though this relates to another part of the case) to carry the whole into effect, though there may be difficulties in attaining it; I say it is competent in point of law. There is an authority existing which can form distinct parishes, or if there can be no such establishment of distinct parishes, the erection of churches and the formation of particular districts within which the duties of the minister of a particular church or chapel is to be exercised, is perfectly feasible, and to give him any assistance he may require in the performance of his private duties, in visiting and instructing the people, is also perfectly feasible. This goes, if not the whole way, nearly the whole way, in attaining the object that the parties had in view.

But not only must the pursuers prove that that which they now state to have been the object of the subscribers, was the real object which they had in view when they parted with their money, but they must prove that the circumstances are now such as to prevent that from taking place which was contemplated and intended as the leading object at the time the subscription was made and the society was formed. Now, what is the fact? At that time it was supposed that the General Assembly and the Ecclesiastical Courts had a power, which it turns out they had not, but it is nowhere put forward, and it nowhere appears as a proposal or condition that any such power or any such jurisdiction was contemplated by the society. It might or might not have been so, but the pursuers have to make out their case, and to prove that the circumstances are now so different from what they were when the society was formed, that that which was contemplated as the thing to be done, has now become impossible to be done. There was one authority then, and there is one authority now.

It is equally competent to carry this into effect. It is not because it is more or less probable that it may be attained; it is not because there is more or less chance of the jurisdiction now being put in motion, than of the jurisdiction being put in motion which was supposed to be competent for the purpose at the date, or anterior to the date, of the commencement of this society; it is not for that reason that the pursuers can allege that it is impossible to carry out this object. A public declaration of the opinion of the Ecclesiastical Courts as to what power they had, had not taken place at that time; that took place in May, 1834, and this society was formed in the early part of 1834: but still, it may be assumed that there was a general understanding or belief that that power existed, and that if it existed it would afford a means by which the whole object might be carried out. But to say that it is impossible to carry it into effect, depends entirely upon two propositions being established. First, that that jurisdiction which clearly could carry it into effect at this very moment, either will not be exercised, or, that the terms upon which alone they would exercise their jurisdiction, cannot be complied with because the parties will not be able to meet the conditions which that jurisdiction imposes. But great subscriptions have been raised, great subscriptions were raised at this time, and much greater subscriptions have been raised by other churches. Why are we at this moment to assume any more than at any period between the year 1834 and the present time, that there is not money enough to effect the purpose? It is an assumption perfectly gratuitous. But it is the bounden duty of the pursuers to prove that the object has failed. The object does not fail, simply because there may not be at this moment money sufficient to effect the purpose; the law provides the means by which it may be carried into effect.

I think that they have also entirely failed in establishing the second proposition to show that the object cannot now be

carried into effect. They have failed in the first in showing that the entire separation of the parishes, so as to detach them from the mother church, was the leading object of those who met together and subscribed their money. My opinion is, that the object they had was to increase church accommodation, no doubt aided by the personal superintendence of the minister of each district, with such other aid as he could obtain; and that so far the case remains just as it did at the time when the subscription was entered into. It was competent for them then, and it is competent for them now; though it may not be competent for them to do it in precisely the way in which they viewed it at the time the subscription was entered into and the society formed; but the main object still remains, and capable of being carried into full execution. Therefore, the pursuers have failed in making out both of their propositions, upon the establishment of both of which alone could they call for the interposition of this House to dissolve the society.

LORD BROUGHAM.—My Lords, I certainly have had some doubt in this case, as to my taking a part in it, as I had not the advantage of hearing the whole of the argument; nevertheless, I cannot but express my entire concurrence, in the opinion of my noble and learned friend, who has just addressed your Lordships. I really do not consider that there is any doubt whatever, that the obtaining divisions of districts was no portion of the object contemplated. It was a means by which the object of Church extension was to be accomplished, it was not essential for that purpose, but it was the means by which it was to be facilitated rather than accomplished. And because that may fail, it does not appear to me to follow, that the object itself fails. It is necessary to prove the failure of the object itself, and not of that particular means which was resorted to, or which was in the contemplation of the parties who had that object in view. The object they had in view was the ground

for the subscription,—the subscription was not for the division of parishes, or the creation of artificial or subordinate districts to the existing parishes, but the object was Church extension, and that object was expected to be facilitated by such division. But the division was not the object, but the means of obtaining the object; consequently, their not being able to attain the object of Church extension by that particular means, or to facilitate the attainment of their object of Church extension by that particular means, can in no sense be said to be a failure of that object, which object was the ground and the governing motive for the subscription.

My Lords, I am very much inclined to argue with my noble and learned friend upon the other part of the case, that there is no proof of any failure, even as to that particular means, if that were the object, but, as I consider that that was clearly not the object, it does not appear to be necessary to deal with that part of the case. As I said before, I should have great hesitation in giving an opinion, if I were not called upon to express it by my noble and learned friends who heard the whole case.

LORD CAMPBELL.—My Lords, I have very little to add to what has fallen from my noble and learned friends; but I think it right to say, that having heard this case with great attention, I am of opinion, that the interlocutor appealed from should be affirmed. The first question we have to consider is, whether the last conclusion of the summons ought to prevail, "that this society should be dissolved, and all the property "sold and distributed among the shareholders."

[*Lord Brougham.*—That is to say, including all those who gave at the church-doors.

Lord Campbell.—It would come to a question of multiplepoinding as to the various claimants, and a very difficult question would arise. What we are now to consider is, whether such a decree should be pronounced.]

Now, my Lords, I could obtain no satisfactory answer to the question I put to the learned counsel during the argument. If this right existed at the time the summons was sued out, when did it first accrue? The learned counsel intimated, I think, that he thought it accrued at the very moment when the subscription took place. It seems to me, that that cannot possibly be maintained, because, at that time, all the parties were engaged in a very pious and laudable object, and which there seemed every reason to believe might be completely accomplished. And it is impossible to say, that any one individual, who had subscribed five shillings to this Church society, might bring an action, and have the whole society dissolved upon the only ground that then could have been taken, which would have been that it was a *communis error*, the notion that the Church had the power to erect *quoad sacra* parishes, for that is the only ground that could then have been taken, and upon that ground at once, without any attempts being made to raise the necessary subscriptions, or to apply to the Court of Teinds, saying nothing of an application to the Legislature, one individual might, according to the argument, have defeated the whole object, and have procured repayment to all the parties entitled to the fund that had been raised.—My Lords, I think it is utterly impossible to maintain that proposition.

Then if there was not a right of action at that moment, when did it accrue? What circumstance has since supervened, to show that there is a right of selling the whole of the property, and defeating the scheme, if it did not exist at the time the scheme was formed?

My Lords, the disruption from the Church, a most lamentable event, if we are to take judicial notice of it, can be no reason why the plan that had been previously formed should be defeated, because it still may be carried into effect.

My Lords, I agree with my noble and learned friends who have preceded me, that, although it was one object, or the

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earnest wish of those who subscribed their money, that there should be *quoad sacra* parishes, though they thought, in accordance with the opinion of Dr. Chalmers, that that was the most effectual mode of instructing the people, and leading them in the paths of religion and virtue, the main object certainly was, as has been stated by my noble and learned friend who last addressed your Lordships, the preaching of the everlasting Gospel, according to the doctrine and discipline of the Church of Scotland. They thought that the most reasonable mode of doing that would be by means of *quoad sacra* parishes, but not that that was the single and only mode of doing it. They did not make that a condition; it was not essential, although they very earnestly wished that that should be the mode which should be adopted for carrying that object into effect. Then if there had been no disruption, and those churches had been all well filled, and had been going on harmoniously, and to the edification of the people, because there had been no *quoad sacra* parishes assigned, all at once those churches should be shut up, that they should be sold, that they should be converted into theatres, and that the people should be deprived of the Christian instruction which they had so long enjoyed, certainly never could have been the intention of those who piously engaged in this scheme.

I likewise agree with my noble and learned friend, that if it were the main object, that there should be *quoad sacra* parishes, there is no proof whatever that that object is unattainable. It is allowed that the Court of Teinds has the power, and it is allowed that the Court of Teinds would exercise that power, if there were an endowment; therefore, all you want is that there should be an endowment. Is it to be supposed, that all charitable munificence is dried up in Scotland, and that those who belong to the Established Church may not imitate that most laudable example which has been set them by the members of

the Free Church, who have liberally subscribed to the instruction of the people?

For these reasons it seems to me quite clear, that the last conclusion of the summons ought not to have been conceded, and that upon that ground the interlocutor ought to be affirmed.

It was very anxiously pressed by Mr. Rolt, in his able address, that, at all events, there should be a declaration, that this fund cannot be applied to the maintenance of chapels of ease. What is contended for is certainly quite correct, as every one acquainted with the constitution of the Church of Scotland knows, that the minister of a chapel of ease is very little different from the minister of a parish *quoad sacra;* and if there had been, before this action was commenced, a controversy as to the construction of the deeds of foundation of those churches, if there had been a controversy as to the construction to be put upon the proposals, and the fundamental rules by which the society was to be held governed, and one party had contended that the fund ought to be applied entirely to chapels of ease, while another party contended that it ought to be applied to obtaining assignments of parishes *quoad sacra;* in an action of declarator, as to the construction to be put upon the deeds of the society, it might be a very fitting thing that such a declaration should be made; but there has never been any such controversy; no one has ever contended that the scheme of having parishes *quoad sacra* should be abandoned, and that they should be content merely with having chapels of ease; but what has been said is this, "We will have parishes *quoad* "*sacra* as soon as we possibly can, but, in the mean time, let "us go on with chapels of ease, and with having ministers for "them, to administer to the people all the religious consola-"tion that it is in their power to do." As to the framing of the summons, it will be found that the declarator, with respect

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to chapels of ease, is introduced merely by way of inducement to the relief which is subsequently prayed. It is not at all the substantive ground upon which the summons rests.

For these reasons, my Lords, I am of opinion, that there is no occasion whatever for this House to interfere, but that we should do well to agree with my noble and learned friend, in the motion he has made to affirm the interlocutor.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

RICHARDSON, CONNEL, and LOCH—GRAHAME, WEMYSS, and GRAHAME, Agents.

[HEARD 13*th*—JUDGMENT 20*th March*, 1849.]

Messrs. McEWAN, SONS and Co., Merchants in Glasgow, *Appellants.*

Messrs. JAMES and ARCHIBALD SMITH, Merchants in Glasgow, *Respondents.*

Sale—Stoppage in Transitu—Vendor and Purchaser.—A delivery note "to the order" of the vendee is not such a document as will, by the endorsement of the vendee, transfer a right of property to the transferee and destroy the vendor's lien for the price.

Ibid.—Where goods have been deposited in a warehouse by an agent in his own name for his principals, naming them, notice to the agent of a delivery note will not work a transference of possession of the goods to the parties giving the notice, so as to defeat the lien of the vendor for the price.

ON the 15th August, 1843, the Respondents sold to Bowie and Co., of Glasgow, forty-two hogsheads of sugar, to be paid for in cash. Afterwards the bargain, at the request of Bowie and Co., was so far altered, that Smith and Co. agreed to take Bowie and Co's. bills at four months instead of cash. The sugars at the time of this sale, were lying in the bonded warehouse of Messrs. Little and Co., in Greenock, where they had been placed by Alexander, the agent of the Respondents, and the entry made in the warehouse-books was "James Alexander for J. and A. Smiths."

At the time of the sale the Respondents handed Bowie and Co. a letter from them addressed to Alexander in these terms,

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" Glasgow, 15th August, 1843,

" Mr. James Alexander, Greenock,

" Dear Sir,—You will please deliver to the order of Messrs. " James Bowie and Co., the undernoted forty-two hogsheads of " sugar, ex St. Mary, from Jamaica, in bond.

" We are,

" J. and A. SMITH and Co.

W
W H 12 hogsheads.
D 30 „

42 hogsheads of sugar."

On the 22nd of August, 1843, Bowie and Co. sold the sugars to the Appellants, the price to be payable by bill. The Appellants gave Bowie and Co. their bills for the price and received from them the letter from Smith and Co. to Alexander, of the 15th August, with an indorsement upon it in these terms, " Deliver to the order of William McEwan, Sons, and Co., " James Bowie and Co."

On the 15th of September the Respondents wrote Alexander, desiring to have the sugars weighed. On the 16th, Alexander answered that Bowie and Co's. agent had got no order of delivery. On the 18th, the Respondents wrote Alexander that Bowie and Co. had " promised to forward order of delivery," and expressing a hope that the sugars had been weighed over. On the 19th Alexander had the sugars weighed, and that day forwarded the weights to the Respondents in a note bearing the following title:—" Weights of forty-two hogsheads of sugar ex " St. Mary, Jamaica, delivered Messrs. James Bowie and Co., " per order of 15th August, 1843;" and along with this note Alexander also sent a note of the warehouse rent charged up to that date.

At the same time Alexander made an entry in his memo-

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randum book of weights and delivery in the same terms with those contained in the note of weights sent to the Respondents.

On the 25th of September the Appellants, through their agents at Greenock, sent to Alexander the letter of the Respondents of the 15th of August, with the endorsement upon it by Bowie and Co., and received from Alexander's clerk, he himself being absent at the time, a note which according to its appearance when produced in Court, was in these terms:— "Greenock, 25th September, 1843. Deliver*ed* to the order of "Messrs. William McEwan, Sons, and Co., this date,

"JAMES ALEXANDER per JOHN ADAMS,

W
W H 12 hogsheads
D 30 „

"Sugar, ex St. Mary."

But the word "delivered" seemed to have been originally "deliver."

On the 25th of September Bowie and Co. stopped payment; and on the 26th their estates were sequestrated.

On the 26th Smith and Co, who had not as yet received from Bowie and Co. their bills for the price of the sale to them, wrote Alexander that they had heard of Bowie and Co.'s failure, and desired him to secure the forty-two hogsheads of sugar, "if "they are still in the warehouse." When this letter arrived, Alexander's clerk was in the act of making an entry in his import-book, where purchasers' names were entered, in regard to these sugars, and had already marked off ten hogsheads as purchased by the Appellants. Alxeander stopped any further entry, and on the same day applied for and obtained leave from the Custom House authorities to remove the sugars into another warehouse, and on the 27th they were removed from Little and Co's. warehouse to another warehouse in Greenock, where they were deposited to the order of the Respondents, and where they continued thenceforth.

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In these circumstances the Appellants presented a petition to the sheriff, praying him to ordain the Respondents to deliver up the sugars to them, and to interdict the Respondents from selling or otherwise dealing with them. The sheriff dismissed the petition, and the Appellants then carried the case by advocation to the Court of Session.

The Lord Ordinary (Wood) on the 17th of December, 1844, remitted the cause simpliciter to the sheriff. The Appellants reclaimed, and the Court being equally divided, upon advising the record which had been prepared in the Sheriff Court, ordered cases to be prepared by the parties, and being still equally divided, after advising these papers, they directed them to be laid before the other Judges for their opinion. The consulted Judges by a majority of six to three, concurred in the interlocutor of the Lord Ordinary, (who was one of the six). In conformity with these opinions, the Court, which still continued to be equally divided, (on the 14th of January, 1847,) adhered to the interlocutor of the Lord Ordinary.

Mr. Turner and *Mr. Anderson* for the Appellants.—The first question which arises is upon the terms of the Factors' Act, 6 Geo. IV., cap. 94, sect. 12, by which it is enacted that any person "entrusted with and in possession of any bill of "lading, India warrant, dock warrant, warehouse-keeper's cer- "tificate, wharfinger's certificate, warrant, or order for delivery "of goods, shall be deemed and taken to be the true owner of "the goods," &c., "so far as to give validity to any contract or "agreement by such person, so entrusted and in possession as "aforesaid, with any person for the sale or disposition of the "said goods," &c., "upon the faith of such several documents "or either of them, provided such person shall not have notice "by such documents or either of them or otherwise, that such "person so entrusted as aforesaid, is not the actual and *bond* "*fide* owner or proprietor of such goods," &c.: And upon the 5 & 6 Vict., cap. 39, which in its first section enacts that any

agent " who shall be entrusted with the possession of goods or " of the document of title to goods, shall be deemed and taken " to be owner of such goods and documents, so far as to give " validity to any contract or agreement by way of pledge, lien, " or security *bonâ fide*, made by any person with such agent so " entrusted as aforesaid," &c.; and in its fourth section " that " any bill of lading, India warrant, dock warrant, warehouse-" keeper's certificate, warrant or *order for the delivery of goods*, " or any other document used in the ordinary course of business, " as proof of the possession or control of goods, or *authorizing*, " *or purporting to authorize, either by indorsement or by delivery*, " the possessor of such document to *transfer or receive goods* " thereby represented, shall be deemed and taken to be *a docu-" ment of title* within the meaning of this Act; and any agent " entrusted as aforesaid, and possessed of any such document of " title, whether derived immediately from the owner of such " goods, or obtained by reason of such agent's having been " entrusted with the possession of the goods, or of any other " document of title thereto, shall be deemed and taken to have " been entrusted with the possession of the goods represented " by such document of title as aforesaid; and all contracts " pledging or giving a lien upon such document of title as " aforesaid, shall be deemed and taken to be respectively " pledges of and liens upon the goods to which the same relates; " and such agent shall be deemed to be possessed of such goods " or documents, whether the same shall be in his actual custody, " or shall be held by any other person subject to his control, or " for him, or on his behalf."

These statutes, therefore, convert possession under a colourable title into an absolute possession, and give third parties power to deal accordingly. When the Respondents gave Bowie and Co. the letter of the 15th of August, 1843, they put them " in possession of an order for delivery," which entitled third parties to consider them the true owners. No doubt there was

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a condition understood at the time that Bowie and Co. should, in exchange, give their bills for the price, but there is no pretence that the Appellants were aware of this condition; Bowie and Co., therefore, were the true owners of the goods so far as regards any sale made by them to third parties, and were as such entitled to give an indefeasable title. The indorsement of the order transferred this title to the Appellants, for the effect of the statute is to make orders for delivery as transferable in the market, as bills of lading had long previously been established to be.

II. But, assuming constructive ownership in Bowie and Co., under the statute, not to be established, the next question is whether constructive possession had not been obtained by the Appellants under the notice given by them to Alexander. The goods had been deposited by Alexander in Little and Co's. warehouse, and he was answerable to them for the rent as they were to him for the safe custody of the sugars. Without his authority Little and Co. could not have transferred the sugars into any other name. If it had not been intended that Alexander should have this control, why were the sugars entered in his name? The only object could have been that he, living upon the spot where they were deposited, would be able to exercise a more immediate, and, therefore, convenient control than the Respondents, residing at a distance, could have exercised.

Alexander, therefore, had the complete immediate control over the goods and, so far as any notice required from a vendee in order to make his purchase effectual was concerned, he stood in the place of the warehouse-keeper in the ordinary case, where there is no one interposed between him and the vendor.

Such being Alexander's position, the letter which the Respondents addressed to him on the 15th August, and put into the hands of Bowie and Co., was equivalent to an order of delivery, addressed to a warehouse-keeper. That letter gave

Bowie and Co. a title of possession, and not being confined to them personally, but extended to their "order," it armed them with a title to deal with all the world, which third parties were entitled to rely upon. The indorsement of the letter to the Appellants effectually transferred to them the title which was thus in Bowie and Co., and the notice which was given to Alexander by the Appellants on the 25th of September, was as effectual to complete transference of the property, as if it had been given to Little and Co., who had the actual corporal possession, for the principle of all the cases in requiring notice to the warehouse-keeper is, that the notice shall be given to the party having the direct control of the goods, and is sufficiently answered where, as in the present case, it is given to an interposed person, who had as complete control as the warehouse-keeper.

No doubt the Respondents, as between them and Bowie and Co., had a lien upon the sugars for payment of the price, which they might have enforced by stopping the sugars *in transitu*, but that right could not be enforced to the prejudice of parties dealing *bonâ fide* with their vendee on the faith of an order by themselves to deliver to him or his order; a document which was negotiable in its nature, and such as parties dealing with the vendee were entitled to rely on as giving a title, and which had been duly intimated to Alexander, the custodier.—*Bell on Sale*, 124.—*Cross on Lien*, 382.—Hawes *v.* Watson, 2 *Bar.* and *Cres.* 540. Here Alexander, as the wharfinger in that case, acknowledged the right of the Appellants by the entry in his books of the delivery to them. A sub-vendee in the general case, is in no better condition than the original vendee, in questions with the original vendor, he merely stands in his place; accordingly, in Dixon *v.* Yates, 5 B. and Ad. 313, it was held, that as the price had not been paid by the vendee, and the vendor had not given an order for delivery, purchasers from the vendee were not entitled to demand the goods, because the

sub-vendee claimed through the vendee, who could not have a title till the price was paid. This, however, may be changed by the act of the vendor himself, in authorising what has passed between the original vendee and the sub-vendee, Pickering *v.* Busk, 15 *East.* 38.

In Tod *v.* Rattray, 1*st February*, 1809, *F. C.* 132, it was held that intimation to Allan, the revenue officer was equivalent to intimation to the warehouse-keeper, that an order of delivery was a transferable document, and that a fund of credit had been given by parting with it; so here the Respondents, by giving the order to Bowie and Co., held them out to the world as the owners of the goods, with whom any one was at liberty to deal in that character. In Hurry *v.* Mangles, 1 *Camp.* 452, acceptance by the vendor of warehouse rent from the purchaser after the period for delivery of the goods, was treated as working a transfer of the property, and putting an end to the right to stop in transitu. In Whitehouse *v.* Frost, 12 *East*, 614, where the goods which had not been taken out of the bulk of which they formed a part at the time of sale, acceptance given by the vendor to a sub-vendee, of a transfer of the vendor's order for delivery, was held to deprive the vendor of power to retain the goods in his possession against the sub-vendee.

Mr. Attorney General, and *Mr. Blackburn*, for the Respondents.—The *first* point taken by the Appellants, cannot arise on the facts of this case, for the statutes, looking to their preamble as well as their purview, were intended to apply only to the case of agents or factors, but Bowie and Co. were neither agents nor factors, but themselves the true owners of the goods upon a defeasible title, which no construction of the statutes can convert into an indefeasible one. The same question was argued and disposed of in Jenkins *v.* Usborne, 7 *Man. & Gr.* 700.

II. The true question which alone can be raised is whether there was a constructive delivery of the sugars to the Appellants?

—whether anything had been done by the vendors to part with possession, whereby they had lost their lien for the price. It is admitted that if Alexander was not custodier of the goods there is an end of the question, and it could not well be otherwise, for if he had not the actual possession, it was impossible for him to give constructive possession.

In questions of stoppage in transitu, what determines the transitus is an act of the custodier of the goods assenting to the contract between the vendor and vendee, and agreeing to keep the goods as the agent of the vendee. Until he does so, no constructive possession is delivered to the vendee. Whitehead *v.* Anderson, 9 *Mees & Wels.* 535. Dodson *v.* Wentworth, 4 *Man. & Gr.* 1080.

What then was the position of Alexander in this respect? The sugars were entered in his name as agent for the Respondents by their names, and the admission of the Appellants upon the record is that they "remained in the warehouse "in Messrs. Smith and Co.'s name, and of course subject to "the order, disposal, and control, by them or those acting for "them." How then could Alexander be the custodier? He had hired the warehouse of Little and Co., no doubt, but he was not even liable for the rent, having disclosed the Respondents as his principals in the hiring. *Ex parte Buckley,* 14 *Mees, & Wels.* 469. The Respondents, therefore, were the contractors with Little and Co. for the use of the warehouse, and were entitled to regulate that use, so far as regarded these sugars, until they had done something, to authorize Little and Co. to consider that their liability to them in respect of the sugars was at an end. If that be so, then intimation to Alexander could not be of any avail, for Alexander was in truth the Respondents. He was their agent and nothing more—intimation to him, therefore, was merely intimation to the Respondents themselves

In Hurry *v.* Mangles, and Whitehouse *v.* Frost, the goods

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had continued after sale in the warehouse of the vendor, who was thus the warehouseman. In the first of these cases, the vendor had accepted rent from the vendee for the period subsequent to that at which delivery of the goods should have been taken, and in the other, the vendor had accepted notice of a sub-sale, and the question in both of the cases was whether the vendor was in truth the warehouseman, and whether what had been done by him was sufficient to determine his right to stop in transitu, so as to defeat a sub-sale. Neither of these cases therefore has any bearing upon the present. In Harman *v.* Anderson, and Lucas *v.* Dorien, the warehouse-keeper was a third party, and the only question in these cases, was whether notice having been given to the warehouse-keeper, what had been done by him was sufficient acceptance of the notice, and attornment to the party giving it. None of these cases give the slightest authority for saying that goods being in the possession of a third party as warehouseman, notice not to him, but to the agent of the vendor, is sufficient to prevent stoppage in transitu.

It does not make any difference in ascertaining what is necessary to be done in order to prevent stoppage in transitu that the question arises with a sub-vendee. A sale by a vendee before he has paid the price of his purchase, is made at the risk of the parties, for though sale gives a right of property it does not confer a right of possession also, nor give the vendee power to confer that right upon another party, unless in so far as the vendor has by his own act enabled him to do so; until the price is paid it is in the power of the vendor to stop delivery of possession, Dixon *v.* Yates, 5 *Bar & Ad.* 313. Bloxam *v.* Sanders, 4 *Bar & Cres.* 941.

But it is said that the terms of the letter of 15th of August formed an estoppel against the vendors stopping the goods in transitu. A bill of lading, for the convenience of trade, has a peculiar effect given to it. It is allowed to be transferable, and to give to the transferee a right of possession, but that

quality has never been allowed to an order of delivery, Farina, *v.* Holmes, 16 *Mees, & Wels.* 119. And the circumstance that the terms of the order were conceived to the "order," of the party does not alter the matter. The sub-vendee was not misled in this respect, for it did not amount to more than an order to Alexander to go with Bowie and Co. to Little and Co., and do what was necessary, and the Appellants must be held to have known that the document would avail nothing until thus intimated to Little and Co., and assented to by them.

LORD CHANCELLOR.—The facts on which the question in this case arises, are very short. Messrs. Smith and Company, the Respondents, having imported a certain quantity of sugars, they were placed in a warehouse at Greenock, of which the keepers were Messrs. James Little and Company, and they were entered in their books in these words, "James Alexander, for J. and A. Smith." They remained in their custody until the time when the parties to whom Messrs. Smith and Company sold them, Messrs. Bowie and Company, had become insolvent. On the 26th of September, Messrs. Smith and Company wrote the following note to Mr. Alexander—"I have "just heard of Bowie and Company's failure. Take imme-"diate steps to secure our forty-two hogsheads of sugar, ex "St. Mary, lately sold them, if they are still in the warehouse." Upon that, Mr. Alexander, who acted for Messrs. J. and A. Smith, caused the goods to be removed into another warehouse.

So far, these facts of course would show no matter of dispute at all, the vendors not having parted with the possession; the possession, in fact, remaining as it was at the time of the sale. Before the possession was parted with, or the custody altered, upon the failure of the vendees, they removed the goods to another warehouse.

But then a question is raised, not on behalf of Messrs.

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Bowie and Company, to whom the goods were originally sold, but on behalf of the present Appellants who bought from them. It appears that the sale to Messrs. Bowie and Company took place and was accompanied by a delivery-note in these words—"Mr. James Alexander. Dear Sir,—you will "please deliver to the order of Messrs. James Bowie and Com- "pany, the undernoted forty-two hogsheads of sugar, ex St. "Mary, from Jamaica, in bond"; upon which it does not appear that anything was done by Messrs. Bowie and Co., but they as it is alleged, afterwards sold these sugars to the present Appellants. The Appellants, however, did nothing in order to obtain possession of the sugars or to transfer the custody into their own name, till the 25th of September. On that day they applied, not to Messrs. Little and Company, with whom the goods were in bond, but they went to the place of business of Mr. Alexander, and Mr. Alexander not being there, a clerk of his, John Adams, gave them the following memorandum: "Greenock, 25th of September, 1843. Deliver to the order of "Messrs. William McEwen, Sons, and Company, of this date." That document is not addressed to anybody; and it appears that the word "deliver" in it had been altered to the word "delivered." Whatever may have been the object of that alteration, and it could not have been any good one, it entirely failed, because it was nonsense to state that the goods were delivered. Delivered they were not, and delivered they could not be, for they were not, in fact, in the hands of Mr. Alexander, but in the hands of Messrs. Little and Company, the warehousemen. This order to deliver the goods, reading it in that way, was, in fact, all that Alexander could have done if he had been there to write it instead of his clerk. Being the agent for the vendors, and the goods being in the warehouse of Messrs. Little and Company, he could only have acted under the authority which he derived from the original delivery-note of the vendors, and all he could have done under it would have been to give directions to the

warehouseman to deliver the goods, and that is the purport and effect of the document which is signed by John Adams in the absence of Alexander.

So far, therefore, my Lords, it is very clear that at the 26th of September, the date upon which the vendors caused these sugars to be removed to another warehouse, nothing had been done to change the possession; Little and Company being the parties in possession, the custodiers of the goods, and the sugar remaining in their warehouse as it had done on the day of the sale. There cannot, therefore, be any doubt, under those circumstances, of the title of the vendors when they heard of the failure and bankruptcy or insolvency of the vendees, to revoke the sale which they had made to them, the price not having been paid, and to deal with the sugars as their own.

But then, this case, which is so clear as to the facts, is met by several points made on behalf of the sub-vendees. The first is, that though a delivery-note it is admitted does not pass the property as a bill of lading would have passed it, and although it has no effect in altering the title to the property, by being handed over and by being endorsed by one party to another, yet it is said the party giving the delivery-note is estopped from disputing it, and it is represented as a sort of fraud in him to give this note into the hands of the vendee and thereby enable him to impose upon some third party. But that is putting the same question in another form. If the party is to be estopped from disputing the title obtained under a delivery-note, that is giving to the delivery-note all the effect of a bill of lading. In fact, there is no such fraud. The effect of a delivery-note is perfectly well known in trade. It is perfectly well known that a title does not pass by a delivery-note, and it is perfectly well known that it does pass by a bill of lading. There is, therefore, no ground, as it appears to me, for that argument, which would, in fact, alter the nature of a delivery-note and convert it into a bill of lading.

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Then it is said that Mr. Alexander was the custodier of the goods, that he was the party in actual possession, and that the possession was altered by that note of the 25th of September. Now, up to the 25th of September, it is not pretended that any application was made either to Mr. Alexander or to Messrs. Little and Company. It is said that Mr. Alexander was the party in possession, and that the note operated as a transfer of the possession. In the first place, it is quite clear to my mind, that Alexander was not in possession of the goods at all. He was named in the books of Messrs. Little and Company only as the agent of the vendors, "Alexander, for Smith and Company." He was, therefore, merely standing in their place, and not in the place of the warehouseman. He was merely the intermediate agent through whom the vendors meant to exercise their rights and powers as the owners of these goods.

Then another point was raised for the Appellants. It was said that this note of the 25th of September had this sort of effect,—assuming that the delivery-note itself, given to the first vendee, had no operation in passing the property, yet if the second vendee comes to the original vendor and obtains a new order, the vendor then cannot afterwards say he has not been paid by the first vendee, and so defeat the title of the second vendee, which he had, in fact, sanctioned, by making that second note, and dealing with him as a party entitled to the custody of the goods. My Lords, it appears to me that that is perfectly answered by this observation, namely,—that with respect to the note of the 25th of September, supposing the clerk to have had the same authority as Mr. Alexander had, supposing Mr. Alexander himself had signed the note, Mr. Alexander had no authority whatever beyond that which the first note gave him. He had no authority to give a better title to the second vendee than the first delivery-note authorized him to give to the first vendee. And this note cannot be considered as a dealing between the vendors and the second

vendee, because, in fact, there was no communication between them.

Therefore, being of opinion that the circumstances, as they stand, without going through the particular points made on behalf of the vendee, clearly leave the title in the vendors; and being also clearly of opinion that those subsequent transactions which are said to take this case out of the ordinary rule, and to give a title to the second vendee, have no operation for that purpose, I shall move your Lordships to affirm the interlocutors appealed from with costs.

Lord Brougham.—My Lords, I have no doubt whatever in this case. I think a great deal of argument has been used in the Court below which is utterly untenable, and that a great deal of ingenuity has been thrown away in endeavouring to perplex the case with matters which do not really belong to it, and that when you come to look at it on its own merits, and according to the facts as they stand, it is very simple and very clear.

The case has been treated as if Alexander were the agent of Smith and Company, the original vendors, and having the same powers in reference to these goods to all intents and purposes as they themselves had. There is no such fact in the case. No authority whatever was given to Alexander, except that which was contained in the first note of the 15th of August, authorising him to deliver the goods to Bowie and Company, the first vendees. Alexander was not in custody of the goods, and he never possessed any authority to sell them, or deal with them in any way.

With respect to the second delivery-note, and the alteration of the word "deliver" to "delivered," I entirely agree with my noble and learned friend, that nothing can possibly turn upon that alteration, for it is absolute nonsense to read it as it is so altered, because it is a notorious fact that the goods were

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never delivered out of the custody of Little and Company in whose warehouse they were. As to the effect sought to be given to the delivery-note, as if it operated as a bill of lading, I also agree with my noble and learned friend, that no such effect is to be attributed to it.

I, therefore, my Lords, consider this to be a case free from all reasonable doubts, and that it is only confused by connecting with it circumstances which really should be kept apart, and by assuming matters to be in the case which, in truth, are not there. I am clearly of opinion, with all the respect I entertain for the minority of the learned Judges, that the conclusion which was come to by the Court was perfectly correct, and that the decision must be affirmed with costs.

Lord Campbell.—My Lords, the simple question in this case is, whether Messrs. Smith and Company, the original vendors of these goods, retained their lien upon them or not. Several of the Judges in the Court below, have expatiated very largely upon the doctrine of stoppage *in transitu*. My Lords, that doctrine has no more bearing upon this case, than the doctrine of contingent remainders. One of the learned Judges says that the doctrine of stoppage *in transitu*, has been recently introduced, and ought not to be extended. My Lords, what is the doctrine of stoppage *in transitu?* It is this; that when a vendor of goods has to send them to a vendee at another place, and has parted with his goods into the hands of a captain of a vessel or a carrier, while they remain in the hands of the captain or carrier, and before they have been delivered to the purchaser, upon the insolvency of the vendee they may be stopped by the vendor. That is a most equitable doctrine. It has been introduced into our commercial law, and I by no means would circumscribe it. But, my Lords, that has nothing in the world to do with this case, which is a pure question of whether the lien, which a vendor originally had, remains, or has been lost.

Surely it has nothing to do with that doctrine, that the vendor has a lien upon them for the price when they are sold for ready money, and, in fact, remain in his possession. That is as old as the doctrine of bargain and sale of personal property.

Well then, my Lords, in this case Smith and Company were in possession of the goods at the time they were sold, and it is not a case in which they were sold to be delivered, at a distance, to the vendee. The vendee is in Glasgow, and the mode of dealing with the goods has been by transferring them, simply by altering the name of the vendor into the name of the vendee.

The goods, therefore, being in the possession of the vendor at the time of the sale, they remained in the possession of the vendor, as it is admitted, for some time after the sale. There was no delivery to the vendee. The price has not been paid, nether has the money been handed over, nor a bill of exchange given for the amount. Then how has the lien been lost? It is first said by the delivery-order. But my noble and learned friend, to my mind, has most clearly and satisfactorily established that that could not be the case, for the delivery-order did not at all change the possession of the goods.

But then it is said that the delivery-order, with the subsequent sale, and the payment of the price of the goods by the second vendee, is to be tantamount to a delivery. But, my Lords, there is no case in which that has ever been done. We know that by the Law Merchant, if a bill of lading is given, and that bill of lading is endorsed for a valuable consideration, it takes away the right of the vendor; but there has been no such decision with regard to the effect of a delivery-note. It is not alleged that such is the usage of the merchants of Glasgow, and it would be the strangest dictum to say that such is the usage. There is no reason to suppose that the delivery-order has any effect at all, further than as giving authority upon the

payment of the price to the person in whose possession the goods are to deliver them. As to the saying that it is an estoppel, which prevents the vendor from exercising his lien, that is merely a circuitous way of saying that it is tantamount to a bill of lading; but upon what ground can it be so? If it could have been proved that such was the custom, then it might have been likened to a bill of lading. If it could have been proved that the intermediate price had been paid, then it might have been said that this was a fraud, but we have no reason to believe that this delivery-order operated otherwise than merely as an authority to the warehouseman in whose custody the goods were, to transfer them to the name of the purchaser upon the price being paid.

Then the delivery-order, and the subsequent purchase and payment of the purchase-money, clearly it appears to me do not take away the lien of the original vendor. It is said that possession has actually been given. Now, if Alexander had been the custodier of the goods, there would have been a foundation for that argument. Alexander was the agent of Messrs. Smith and Company, the vendors; but for what was he their agent? He was their agent to land and sell the goods. He was a broker. He was not a warehouse-keeper. The goods were not in his possession. The goods were in the possession of the keeper of this warehouse, not of Alexander, and therefore the foundation upon which this argument of the possession being transferred, as if Alexander were the custodier, he appearing only to have been the broker, and not the warehouseman, is based, entirely falls.

My Lords, it is said that this case is one of great hardship. But we must take care that hard cases do not make bad law; but I do not see that it is a case of such extreme hardship. It appears to me that McEwan and Company were guilty of very considerable negligence. When they bought the goods, they knew that they had been the property of Smith and Company,

and they ought to have inquired whether the purchase-money had been paid or not. It is quite clear that the delivery-order was no guarantee to them that the price had been paid, and they ought either to have inquired before they entered into the bargain, or at all events before they themselves parted with their own money, whether the price had been paid by Messrs. Bowie and Company, or they should immediately have seen that the transfer was made into their own names. They remain, however, entirely supine till the failure of Messrs. Bowie and Company.

This decision of your Lordships, if your Lordships shall adopt the suggestion of my noble and learned friend, will not embarrass commerce in the slightest degree. It will only throw upon a person who buys goods under the circumstances of McEwan and Company, the necessity of being more cautious in their dealings. Therefore I fully concur with my noble and learned friends.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed, with costs.

LE BLANC and COOK—RICHARDSON, CONNEL, and LOCH, Agents.

[HEARD 22*nd*—JUDGMENT 26*th March*, 1849.]

WALTER MALCOLM, Writer, in Edinburgh, Assignee, of the heir and disponee of James Thomson, *Appellant.*

THOMAS MANSFIELD, and Others, Trustees for and Partners of the Northern Reversion Company, *Respondents.*

Inhibition—Record.—An error in the entry upon the record of letters of inhibition, used on the dependence of an action for a specific debt, in regard to the amount of the debt, is fatal to the validity of the inhibition.

IN the month of May, 1830, James Thomson raised and executed letters of inhibition on the dependence of an action against Anstruther. The letters proceeded on this recital: "Whereas it is humbly meant and shewn to us, by our lovite, "James Thomson, writer to our signet, that he has raised and "intended action, before the Lords of our Council and Session, "at his instance, against Captain Robert Anstruther of Third "part, concluding that the said Captain Robert Anstruther ought "and should be decerned and ordained, by decreet of our said "Lords, to make payment to the complainer of the sum of "1,271*l.* 19*s.* 7*d.* sterling, being the balance due to the com- "plainer, by the said Captain Robert Anstruther, on account- "current between them, composed of business charges per- "formed by the complainer, and payments made by him to the "said Captain Robert Anstruther on the one side, and sums "received by the complainer on account of the said Captain "Robert Anstruther on the other, conform to account-current "between them, commencing on the first day of August, 1827

" and ending on the fifth day of October, 1828, and to a con-
" tinuation of the said account-current, commencing on the said
" fifth day of October, 1828, and ending on the 15th day of
" May, 1829, on which last account the said balance of
" 1271*l.* 19*s.* 7*d.* sterling, arises due to the complainer, with the
" legal interest thereof, from the said 15th day of May, 1829, and
" thereafter during the non-payment of the same; together with
" the sum of 100*l.* sterling, or such other sum, more or less, as
" the said Lords should modify as the expenses of process to
" follow thereon, besides the dues of extracting the decreet to
" be pronounced therein, as the said summons shown to the
" said Lords of Council and Session hath testified; and the
" said Captain Robert Anstruther, knowing perfectly that the
" complainer will obtain decree against him in the said action,
" for payment of the above sums of money, and is to suit all
" manner of execution against him for the payment thereof."

Upon this recital the will of the letters gave authority to charge the debtor not to do any act " to the hurt and prejudice " of the complainer, anent the implementing and fulfilling to " the complainer the decree to be obtained at his instance, in " the said depending process, and payment making to him of " the whole sums to be therein contained."

These letters were entered upon the record of inhibitions, but in the entry there was a discrepancy between it and the original letters, in regard to the amount of the debt for which inhibition was used. The entry upon the record made the recital of the letters state that Thomson had " raised and in-
" tended action before the Lords of our Council and Session,
" at his instance, against Captain Robert Anstruther of Third
" part; concluding, that the said Captain Robert Anstruther
" ought and should be decerned and ordained, by decreet of our
" said Lords, to make payment to the complainer of the sum of
" 1,221*l.* 19*s.* 7*d.* sterling, being the balance due to the com-
" plainer, by the said Captain Robert Anstruther, on account-

" current between them, composed of business charges per-
" formed by the complainer, and payments made by him to the
" said Captain Robert Anstruther, on the one side, and sums
" received by the complainer, on account of the said Captain
" Robert Anstruther, on the other, conform to account-current
" between them, commencing on the 1st day of August, 1827,
" and ending on the 5th day of October, 1828, and to a con-
" tinuation of the said account-current, commencing on the said
" 5th day of October, 1828, and ending on the 15th day of
" May, 1829, on which last account *the said balance of*
" 1,271*l.* 19*s.* 7*d.* sterling arises due to the complainer, with the
" legal interest thereof, from the said 15th day of May, 1829, and
" thereafter during the not payment of the same; together with
" the sum of 100*l.* sterling, or such other sum, more or less,
" as the said Lords should modify, as the expenses of process
" to follow hereon, besides the dues of extracting the decreet
" to be pronounced therein, as the said summons shewn to the
" said Lords of Council and Session hath testified." The out-
set of the subsumption was, " And the said Captain Robert
" Anstruther, knowing perfectly that the complainer will obtain
" decree against him in the said action *for payment of the above*
" *sums of money*, and is to suit all manner of execution against
" him for payment thereof," &c., and the will that the debtor
was charged not to do any act " to the prejudice of the complainer
" anent the implementing and fulfilling to the complainer, the
" decree to be obtained at his instance, in the said depending
" process, and payment making to him of the whole sums to be
" therein contained."

Upon the 17th of June, 1830, Thomson obtained decree in his action for 1,271*l.* 19*s.* 7*d.*, as the amount of the debt for which inhibition had been used.

In a ranking and sale of Anstruther, the debtor's, lands the Appellant, as in right of Thomson, claimed to be ranked and preferred in respect of the inhibition and decree, for a debt of 1,271*l.* 19*s.* 7*d.*

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The Respondents objected to the Appellant's claim that the inhibition was void in respect of its not being duly recorded.

On the 23rd January, 1830, the Lord Ordinary (Robertson), prenounced the following interlocutor, to which he added the subjoined note, "Having considered the revised minutes of "debate, finds that the letters of inhibition on which the claim-"ant, Walter Malcom, claims a preference in the present "ranking and sale, have not been duly recorded; and, therefore, "that no preference over any of the other creditors can be "founded on the said letters of inhibition, and remits to the "common agent to rectify the order of ranking accordingly; "Finds the said Walter Malcom liable in the expenses of this "discussion; appoints an account thereof to be given in, and, "when lodged, remits to the auditor to tax the same and to "report."

To this interlocutor the following note was subjoined:—"The inhibition in this case proceeded on the dependence of an "action, concluding for payment of the sum of one thousand "two hundred and *seventy*-one pounds, nineteen shillings and "sevenpence sterling, conform to a certain account-current. The "letters of inhibition are correct, and in every way comformable "to the conclusions of the action. As entered upon the record, "however, the inhibition describes the action as concluding for "the sum of one thousand two hundred and *twenty*-one pounds, "nineteen shillings, and sevenpence, instead of one thousand "two hundred and *seventy*-one pounds, nineteen shillings, and "sevenpence; and this is said to be conform to the account-"current, 'on which last account the *said* balance of twelve "'hundred and *seventy*-one pounds, nineteen shillings, and "'sevenpence sterling, arises due to the complainer, with the "'legal interest,' and the sum of 100*l.* of expenses. It is then "subsumed that the complainer will obtain decree for payment "'of the *above sums* of money,' and that the defender, accord-"ing to common form, intends to alienate his heritage in de-

"fraud of the debt. The Act 1581, cap. 118, expressly de-
"clares, that 'all letters of interdiction and inhibition, with the
"'executions thereof, the said Sheriff-clerks shall insert in their
"'registers.' The question here is, whether the letters of inhi-
"bition have been duly recorded, the sum for which the
"action concludes, and to which extent the diligence is raised,
"being erroneously described as 1,221*l.* 19*s.* 7*d.*, instead of
"1,271*l.* 19*s.* 7*d.*? If this be considered a material error in
"stating the conclusions of the action, it does not appear to the
"Lord Ordinary that the defect can be held as cured by the
"reference to an account-current to which the conclusion is
"said to be conform, when in fact, as stated, it is disconform to
"the extent of 50*l.*; nor by the statement that the complainer
"will obtain decree for payment of the *above sums* of money,
"which surely cannot mean both the 1,221*l.* and 1,271*l.*, and
"which is in no way identified with either sum. These discre-
"pancies only make the blunder, which is undoubtedly a cle-
"rical error, the more palpable. The question is, whether
"the letters have been duly and properly 'insert in the register,'
"or whether there be not a material discrepancy?

"The case of Henry *v.* Pearson, 9th March, 1838, cannot
"rule the present. There the question was, whether the omis-
"sion of the will of the letters, and certain other formal parts
"thereof, invalidated the registration? and the Court, after a
"report upon the state of the practice, held that it did not.
"An act of sederunt was afterwards passed, 11th December,
"1838, for remedying the practice in time to come. But the
"present is not a case as to which there can be any practice
"alleged. The objection does not rest on the omission of
"words of style, but on a disconformity in the amount of the
"sum for which the diligence is used between the letters and
"the record. On this there can be no *practice*, and if the
"disconformity be material (the matter being of the very essence
"of the debt) no practice could cure the defect. Neither

" can the argument of the claimant derive any aid from the " case of Tofts, November, 1772, *Mor.* 6970, where there was " no disconformity between the record and the letters of inhi- " bition, but where the conclusion of the action, being one of " count and reckoning, was for a general random sum, and the " inhibition was used conform thereto, and so recorded.

" The case of Lowe *v.* Jeudwine, 10th March, 1815, seems, " on the other hand, almost conclusively in point. There an " inhibition on the dependence was stated on the record to " have been raised on an action concluding for payment of the " amount of a judgment of the Court of King's Bench, stated " to be 12*l.* instead of 12,000*l.* No doubt the omission of the " word 'thousand' created a larger discrepancy than the use of " the word 'twenty' in place of the word 'seventy' in this case. " But the due insertion of the instrument in the register is a mat- " ter absolutely required by the statute. This is not a question " of degree, or of construction as to what was meant. It was " no doubt as well known in the case of Lowe, that the party " meant to say, as he ought to have said, 12,000*l.* in place of " 12, as in this case he meant to say, as he ought to have said, " 1,271*l.* in place of 1,221*l.* No person can say that the sum " of 50*l.* is in the eye of law immaterial; and if there be a " material blunder, surely it is a bad reason for sustaining the " instrument in a competition of diligence, that the blunder is " palpable on the face of that instrument itself. The Lord " Ordinary, therefore, conceives that the objection to the re- " cording of the inhibition must be sustained. The analogous " cases as to recording instruments of sasine, M'Queen *v.* " Nairne, 23rd February, 1824; Dennistoun *v.* Speirs, 16th " November, 1824; Stewart *v.* Lord Fife, 20th February, 1827, " strongly support this view."

On the 8th July, 1846, the Court adhered to this interlocutor. Against these two interlocutors, the appeal was taken with the leave of the Court below in terms of the statute.

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Mr. Turner and *Mr. A. McNeill* for the Appellant. The inhibition here bore upon the face of it that it had been used on the dependence of an action, its efficacy therefore depended, not on the amount that might be stated in the letters, but upon the amount which might be recovered by the decree in the action. The preamble of the Act 1581, cap. 118, by which the registration of inhibitions is required, is, "To the effect that "every one of our sovereign lord's lieges may know and un- "derstand the condition and quality of the person with whom "he contracts on this head, whether he be subject and thrall "to interdiction and inhibition, or be at his own freedom and "liberty to contract." The statute in the terms which it uses for accomplishing this object of notice to the world is very general. The "letters of interdiction and inhibition with the "execution thereof, the said Sheriff-clerks shall insert in their "registers." No particular mode of registration is pointed out, a reasonable construction therefore, holding that if the substance of the letters appear upon the Register, the letters should be available, would answer all that the Legislature had in view; and this seems to have been the view taken by the Court below, for in Henry *v.* Pearson, 16 *Sh.* 827, an inhibition was sustained, although there were various omissions and abbreviations in the record, one of them an omission of the whole will of the letters, the unanimous opinion of the Court being, that "from "the earliest period the literal insertion in the register of the "whole inhibition and execution was not in practice held to be "necessary." And in McLellan *v.* Allan, *Mor.* 4967, an inhibition, in which two bonds were mentioned, was sustained, although the register made mention of only one.

No doubt in Lowe *v.* Jeudwyn, 10th March, 1815, *F. C.* 340, the inhibition was declared void, because of an omission in the record, but there the diligence was used in security of a debt already ascertained by decree of an English Court, and the error in the record was a mis-statement of the date of that decree,

and of the amount of the debt ascertained by it, to the extent of stating it to be 12*l.*, instead of 12,000*l.* Moreover, the decision of that case may very well be rested upon the other grounds which were taken in it, and which were sufficient of themselves for its disposal. But even if that decision were rested upon the error in the record, the case was totally different from the present, for there was nothing on the record to show what the nature of the error was, or even whether there had been any error at all,—while here, although the amount of the debt was stated, the letters at the same time intimated that they had been used upon the dependence of an action, and that the amount must therefore be regulated by the result of that action, and the amount was so stated as to shew that 1,221*l.* 19*s.* 7*d.* had been used instead of 1,271*l.* 19*s.* 7*d.* In fact the statement of any amount was mere surplusage. In the case of the Creditors of Tofts, *Mor.* 6970, an inhibition was sustained, although no sum was specified, because it was upon the dependence of an action, and in the case of Brereton, 2 *Sh.* 713, the same result occurred, although the summons, on the dependence of which the inhibition had been used, had been amended after the diligence was raised, to the effect of changing the character in which the party was liable.

Some argument by analogy may likewise be drawn from the English cases under the Act for the Registration of Annuity Deeds. In Ince *v.* Everett, 6 *Term Rep.* 545, the security was upon a term of sixty-two years, but in the memorial entered upon the register, the term was mentioned as sixty-one years, and the consideration, which was 280*l.*, was in the memorial stated to be 250*l.*, yet the deed was sustained, although by the statute the consideration is one of the things required to be inserted in the memorial, in this respect differing from the statute for the registration of inhibitions, which does not prescribe any particular form of registration. In Wyatt *v.* Barwell, 19 *Ves.* 438, clerical mistakes as to the names of the

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parties in the enrolment of an annuity deed was held not to vitiate the annuity.

In Knight *v.* Lake, 2 *Bing. New Ca.* 72, in the head of the memorial, which should have been "person or persons for "whose life or lives the annuity or rent-charge is granted," the words "life or lives," were omitted, yet this was not held to vitiate the enrolment. In Nash *v.* Godwin, 1 *Bar. & Ad.* 634, the Annuity deed was no doubt held to be void, because while it stated the bond to be for 237*l.* the memorial stated it at 257*l.*; but there the memorial did not afford any means for ascertaining which was the correct sum. In the present case that is not so, for the record, by speaking of "*the said sum of* "1,271*l.* 19*s.* 7*d.*," shewed that the previous sum should be that amount, and not 1,221*l.* 19*s.* 7*d.*

At all events, if the inhibition is to be affected by the error in the registration, it can only be to the effect of reducing the amount for which it is to be a security from 1,271*l.* 19*s.* 7*d.* to 1,221*l.* 19*s.* 7*d.* In Dunbar *v.* Cor. of Dunbar, *Mor.* 3699, where there were lands lying in different jurisdictions, and inhibition was recorded only in one jurisdiction, the inhibition was sustained as effectual in respect of the lands lying in the jurisdiction within which it was recorded.

Mr. Stuart, *Mr. B. Andrews*, and *Mr. Anderson*, for the Respondents, cited Lowe *v.* Jeudwine ut supra, and McQueen *v.* Nairne, 2 *Sh.* 637, Dennistoun *v.* Speirs, 3 *Sh.* 285, and Stewart *v.* Fife, 5 *Sh.* 384,—cases which occurred in regard to the registration of sasines.

LORD CHANCELLOR.—My Lords, it appears to me that this is a case in which, having heard the arguments of the learned counsel for the Appellant, your Lordships will entertain no doubt that the appeal should be dismissed. The question depends entirely upon the construction to be put upon the Scottish Act of Parliament of 1581, cap. 118, and we can look

at nothing but that Act to guide us in coming to a conclusion. The only question therefore is, whether the requirements of that statute have been complied with in this instance. The Act, after providing that interdictions and inhibitions shall be registered, provides "which letters of interdiction and inhibition, "with the execution thereof, the said sheriff-clerks shall insert "in their registers," and then it provides "that no interdiction "or inhibition to be raised and executed hereafter, be of force, "strength, or effect, to any intentions, but the same be null "and of none avail, except the same be duly registered, as "said is." Well, then, according to that provision, letters of interdiction and inhibition are to be registered, and if they are not duly registered as is provided there, the Act says they shall be of no avail.

The question, therefore, is whether the letters of inhibition in this case have been duly registered. From the letters it appears that the error was in making the record 1,221*l.* instead of 1,271*l.* The inhibition as recorded runs thus:—"Whereas, it is humbly "meant and shown to us by our lovite James Thomson, writer "to our signet, that he has raised and intended action, before "the Lords of our Council and Session, at his instance, against "Captain Robert Anstruther of Third part, concluding that the "said Captain Robert Anstruther, ought and should be de-"cerned and ordained, by decreet of our said Lords, to make "payment to the complainer of the sum of 1,221*l.* 19*s.* 7*d.* "sterling, being the balance due to the complainer, by the "said Captain Robert Anstruther, on account current between "them, composed of business charges performed by the com-"plainer, and payments made by him to the said Captain Robert "Anstruther, on the one side, and sums received by the said "complainer on account of the said Captain Robert Anstruther "on the other, conform to account current between them, com-"mencing on the first day of August, 1827, and ending on the "5th day of October, 1828, and to a continuation of the said

" account current, commencing on the said 5th day of October, " 1828, and ending on the 15th day of May, 1829, on which " last account the said balance of 1,271*l.* 19*s.* 7*d.* sterling arises " due to the complainer, with the legal interest thereof, from " the said 15th day of May, 1829, and thereafter during the " non-payment of the same, together with the sum of 100*l.* " sterling, or such other sum, more or less, as the said Lords " should modify, as the expenses of process to follow thereon, " besides the dues of extracting the decreet to be pronounced " therein, as the said summons shown to the said Lords of " Council and Session hath testified, and the said Captain Robert " Anstruther, knowing perfectly that the complainer will obtain " decree against him in the said action for payment of the " above sums of money, and is to suit all manner of execution " against him for payment thereof, he, in manifest defraud, " hurt, and prejudice of the complainer, intends," &c. The writ then proceeds, according to the usual form of inhibitions, the object of the diligence being set forth to be that of preventing the debtor from alienating his lands in defraud and to the hurt and prejudice of the complainer, anent the implementing and fulfilling to the complainer the decree to be obtained at his instance in the said depending process and payment making to him of the whole sums to be therein contained. The result, therefore, is that it recites that the amount to be recovered, or expected to be recovered, is 1,221*l.*, that is a recital of the actual payment to be made, and of the amount of the claim made in the suit.

My Lords, it is said that in this there is no obscurity, and nothing inconsistent with the inhibition itself, because it goes on to say " conform to the account current between them, com- " mencing on the 1st day of August, 1827, and ending on the " 5th day of August, 1828, and to a continuation of the said " account current commencing on the said 5th day of October, " 1828, and ending on the 15th day of May 1829, on which

" last account the *said* balance of twelve hundred and *seventy-* " one pounds"—there the right sum being inserted—but the said balance is 1,221*l.*; it is a palpable contradiction, a palpable error, palpable upon the face of it—and thus the last sum is the erroneous sum, and not the first. It states that the sum is 1,221*l.*, and subsequently speaking of the *said* balance, calls it 1,271*l.*; there is no ambiguity in that. To make anything of this variance in the different parts of the record, it ought to appear that 1,221*l.* is a clear error, and that 1,271*l.* is the sum that ought to be recorded—whereas it is the reverse; 1,221*l.* is evidently the sum intended to be expressed as the amount of the claim, and 1,271*l.*, as placed on the record, would appear to be an error. Upon the face of the document there is an inhibition to the amount of 1,271*l.*, and upon the face of the record, which professes to be a record and copy of the inhibition, the amount is confined to 1,221*l.* Then, that being so, the Act of Parliament has not been complied with, because, if we look to the record, we are misinformed as to what is the amount of the sum, and whether the Act be wise or not wise, or hard or not hard, is not the question. The question is, has the Act of Parliament been carried out? Is that a sufficient record of the inhibition? The inhibition itself being an inhibition for 1,271*l.*, is it properly described and stated upon the record, when it is stated to be an inhibition for 1,221*l.*? My Lords, if you had nothing to guide you but a reference to the Act of Parliament, I should think you would find it extremely difficult to come to a conclusion that according to the Act, that was a record of the inhibition; and then the record not being in conformity with the inhibition, the Act says it shall be void altogether.

My Lords, that being so, the case of Lowe *v.* Jeudwine, is precisely and identically the same thing. There an action was brought in the Court of King's Bench here for the sum of 12,000*l.*, for which a judgment was obtained, upon which an action was raised in the Court of Session, and an error arose in the

record of the inhibition, it being stated as 12*l.*, leaving out the thousand—that was only an error as to the sum; but what was the result of that? Why, the same argument was used before the Court, that nobody could be deceived by it, that you might go to the document to find it out, and, therefore, that the record was not void on account of its being erroneous by a misdescription; however, that did not succeed, as the decision was, that in respect of the informality in the registration of the inhibition it was bad. That was one ground of the decision. The fact that there were other grounds is quite immaterial for this case; the only use to be made of the case is, to show the judgment upon the particular point; the judgment upon that particular point was, that there was a departure from the inhibition itself, that it was very apparent that it was not a record of the inhibition, as a substantial part varied; and, therefore, that substantial departure from the inhibition was fatal to the record, and there was an end of it. What the other circumstances were, whether there was a fatal error, or whether there was an inaccuracy, in other respects, matters not; that was the only point as affecting the record for which it was cited; there was no inconsistency in the record beyond that, but that was an omission in the record itself.

My Lords, this is a different case from that of Henry *v.* Pearson. The Court afterwards disapproved very much of the practice in the registering of the document, which they seemed wholly to have passed over in that particular case, and the Court of Session subsequently took care, by an order, that that should not occur in future. Whether there was a deviation, an altering, not by anything contradictory, but by omissions, I cannot discover. Seeing, however, what the Court said, and what the Court did, in that case, I cannot doubt that if there had been any contradiction or inconsistency, which there is in this case, they would not have supported the inhibition. They seem to have been quite reconciled with the principle on which

it ought to be regulated. At the same time it would appear that they did not consider that point in that case.

But in this case, looking to the record, there is an inhibition for a sum which may, or not, exist; there might be twenty more different sums. How is the party to know? The record gives one sum, 1,221*l.*, while the inhibition is 1,271*l.*; the record does not agree with the thing to be recorded, and the Act of Parliament requires that it should. There are no means of getting out of the difficulty which the Act of Parliament imposes; and this decision of Lowe *v.* Jeudwine, seems to me to be quite conclusive upon the point. This is a case of construction, where the English Law and English Acts of Parliament throw no light upon the matter.

Under these circumstances, my Lords, I shall move your Lordships that the interlocutor appealed from be affirmed with costs.

LORD BROUGHAM.—My Lords, I do not think it necessary to trouble your Lordships with any lengthened observations, after the very satisfactory opinion which has just been given by my noble and learned friend. I have had no doubt about this case throughout the whole of the argument, as I have thrown out from time to time, and except with reference to the future, it seems totally unnecessary therefore to enter further into the matter than to say that we must attend to the words of the Act of Parliament; and that we are not to take lax and vague views induced and created by laxity of practice. My Lords, I must say, with all due respect to the practice of the Courts of Scotland, that a certain degree of laxity of practice prevails among very clever and ingenious men no doubt. It therefore becomes highly necessary that we should support a judgment which has proceeded upon a strict, vigorous, and just rule of law, namely, that of upholding the manifest words of the Act of Parliament.

My Lords, if I had had any doubt whatever upon the sub-

ject before, which I had not, the case of Lowe *v.* Jeudwine is not to be got over; it matters not whether it was decided entirely upon this point, it certainly is an authority upon this point, because this is one point upon which it turned. Therefore, I entirely agree with my noble and learned friend in advising your Lordships that this appeal should be dismissed with costs.

Ordered and Adjudged, That the Petition and Appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

LAW, HOLMES, ANTON, and TURNBULL—G. and T. W. WEBSTER, Agents.

[HEARD 19*th*.—JUDGMENT 27*th March*, 1849.]

MESSRS. KENNETH MATHESON and SON, Contractors at Dullatur, *Appellants*.

ALEXANDER ROSS, Contractor at Cumbernauld, *Respondent*.

Appeal.—It is competent to appeal against an interlocutor upon a question as to admissibility of evidence reserved at a trial by jury for the opinion of the Court.

Stamp Act—Evidence.—An unstamped receipt used to prove a matter collateral to proof of payment of the money mentioned in it, is admissible evidence, unless the collateral purpose is to be established by proof of the particular payment. In such a case it will be inadmissible.

THE Respondent brought an action against the Appellants for payment of two sums of money, one of 143*l*. 3*s*. 11*d*., as the balance of the contract price of work performed for them, and the other of 662*l*. 15*s*. 4*d*., as the price of certain extra work.

The Appellants pleaded in defence that accounts had been adjusted between them and the Respondent, before the work done by him had been measured, and that after crediting him with sums amounting to 1,250*l*. 1*s*. 4*d*., and debiting him with payments amounting to 1,181*l*. 12*s*., there remained a balance of 68*l*. 9*s*. 4*d*., which had been paid to the Respondent on the 17th January, 1842; that the work had been afterwards measured, and then it was discovered that the Appellants still owed the Respondent 34*l*. 17*s*. 3*d*., to account of which they paid him 25*l*. on the 2nd April, 1842, leaving a final balance of 9*l*. 17*s*. 3*d*., which they were ready to pay.

The cause went to trial upon two issues, whether the Appel-

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lants were due and indebted to the Pursuer the two sums sued for.

The Respondent, in support of his case, tendered as evidence a "note of the payments received from Messrs. Matheson "and Son, for the Easter contract, at Dullatur," in which there was the following entry:—"1842, January 14, cash received, "68*l.* 9*s.* 4*d.*"

The Appellants, among other evidence, tendered the following document:—

State of Settlement with A. Ross, 13th January, 1842.

Dr. ALEXANDER ROSS.				*Cr.*			
1841.				1841.			
Aug. 7.	Cash	£240	0 0	Aug. 7.	Pay-bill	£305	14 9
Sep. 4.	Do. £230 and £4	234	0 0	Sep. 4.	Do.	277	0 3
Sep. 11.	Do.	50	0 0	Oct. 2.	Do.	280	3 9
Oct. 2.	Do. Horses	17	2 0	Oct. 30.	Do.	202	4 2
Oct. 2.	Do.	210	0 0	Nov. 27.	Do.	139	14 9
Oct. 30.	Do.	155	10 0	Dec. 11.	Do.	45	3 8
Nov. 1.	Do.	20	0 0				
Nov. 5.	Do.	10	0 0				
Nov. 13.	Do.	20	0 0				
Nov. 17.	Do.	20	0 0				
Nov. 27.	Cash	100	0 0				
Dec. 4.	Do.	20	0 0				
Dec. 11.	Do.	40	0 0				
Dec. 21.	Do.	20	0 0				
1842.							
Jan. 13.	Do.	25	0 0				
		£1181	12 0				
	Balance	68	9 0				
		£1250	1 4			£1250	1 4
Jan. 17.	To cash	£68	9 4	Jan. 13.	By Balance	£68	9 4

They also tendered a piece of paper which had originally been part of that on which the account was written, and which contained the following writing:—

"*Dullatur*, 17*th Jan.*, 1842.

"I acknowledge having received from K. Matheson "68*l.* 9*s.* 4*d.* sterling, being balance amount of pay-bills paid "from 7th August to 11th December, both inclusive.

"(Signed) ALEX ROSS.

"£68. 9*s.* 4*d.*"

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An objection was taken by the Respondent to the admissibility of this latter document as a receipt to prove the payment of the sum mentioned in it; but no objection on that ground was taken to its admissibility as a document to prove the state of the account: it was therefore received, subject to all objections; but afterwards, the Judge presiding reserved right to the Appellants to get it stamped, if they thought it required a stamp for the particular use they proposed to make of it.

The jury, under the direction of the Court, returned a verdict for the Respondent, with leave to the Appellants to apply to the Court to enter up a verdict for them. The Appellants moved the Court accordingly, when the Respondent argued, that the document, purporting by its term, to be a receipt for 68*l.* 9*s.* 4*d.*, and tendered by the Appellants, not for the purpose of proving the receipt by the Respondent of that money, but of shewing the state of the account between the parties at the particular date, could not be received in evidence for any purpose whatever, as it did not bear a stamp. The Court ordered minutes of debate upon this question to be laid before the whole Court for its opinion.

The consulted Judges, by a majority of six to three, were of opinion that the paper could not be received in evidence, and the division of the Court, (the second) before which the case depended, concurring in that opinion by a majority of three to four, pronounced the following interlocutor:—

"In respect of the opinions of a majority of the consulted "Judges, refuse the motion for the defenders to direct the "verdict to be entered up for them, and find the pursuer entitled "to the expenses incurred by him in this discussion, subject to "modification."

Sir F. Kelly and Mr. Anderson for the Appellants.—The document upon which this question arises was tendered in evidence, not to shew the receipt of 68*l.* 9*s.* 4*d.*; that was wholly unnecessary, for the Respondent had himself proved that

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payment by the "note of payments," which he himself produced in evidence. The only use which the Appellants desired to make of the document was, to shew the acknowledgment in it that 68*l.* 9*s.* 4*d.* was "the balance of pay-bills paid from 7th "August to 11th December both inclusive," and thereby to confirm and establish the "state of settlement," of which the evidence shewed that this receipt originally formed a part, for this purpose they tendered, what is now two documents, but was originally only one, as if it existed in its original condition, in order that the signature of the part at the foot of the document might be connected with the account, but in doing so, they disclaimed all use of the words of acknowledgment, as much as if they were *non scripta.*

This purpose was one wholly collateral to and independent of evidence to show payment of the money mentioned in the receipt. The Stamp Act declares that all notes, memoranduma, or writings whatever, given "for or upon the payment of "money," shall be construed to be receipts, which by another part of the statute, must have a stamp impressed upon them. But the statute nowhere declares that a paper, shewing the close of a variety of transactions, must, if used to prove the state of these transactions, have a stamp upon it. The fact of payment of the 68*l.* 9*s.* 4*d.*, which the document acknowledges no doubt, was wholly immaterial to the Appellants, as immaterial as if, instead of using it to shew the account, they had produced it merely to shew that the Respondent could write. What is important for them is, to shew by the signature of the Respondent, that he acknowledged the correctness of the accounts. Although the signature is at the receipt, yet the account and the receipt being on one paper, there cannot be a question that the signature applied equally to the account as to the receipt. It may be said, certainly, that using it for the purpose for which the Appellants tender it, the receipt is used to prove the payment of the different sums at the Respondent's debit

in the account; but still that is collateral to proof of the payment of 68*l.* 9*s.* 4*d.*, of which sum alone the document purports by its terms to have been given "for or upon the payment of." If this form of the objection were to be given effect to, it would amount to this, that there must be a receipt for every individual payment on the debit side of an account, however numerous they may be; but nothing so preposterous was ever attempted before. Where an entry is made on an account immediately upon the receipt of money, it cannot be read, because that is a palpable evasion of the stamp laws. Wright *v.* Shawcross, 2 *B.* & *Ald.* 502. But where the entries in a fitted account are made long after the actual payment, there is no authority for saying that a stamp receipt, for each payment, is necessary to support the account. If such a rule were to be laid down, it would be impossible for trade to go on. In Wellard *v.* Moss, 1 *Bing.* 134, an account of sums advanced to, and disbursements made for, the Plaintiff, and containing these words, "I acknowledge the above account being correct, and "am fully satisfied therewith," was received as evidence of the advances and disbursements, although there was no stamp upon the paper. In Clark *v.* Hougham, 3 *Dow.* & *Ry.* 322, which was an action by a tenant to recover from his landlord various surcharges which the landlord had made upon the tenant, under a stipulation in a lease, that the tenant should reimburse the landlord for taxes paid by him various accounts of taxes paid, which had been, from time to time, rendered by the landlord to the tenant, having the word "paid" at the foot, in the writing of the landlord, were received as evidence to prove the surcharge. In Terbutt *v.* Ambler, 2 *Car.* & *P.* 60., a "Memorandum, 30th April, 1836, settled all accounts of law "business up to this day, and will give a receipt in full of all "demands when called for," with an agreement stamp upon it, was received, although it had not any receipt stamp. In Brooks *v.* Davies, 2 *Car.* & *P.* 186, a writing by the acceptor

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of a bill, in the form of an account charging the drawer with the price of a piece of cloth exceeding the amount of the bill, and giving him credit for the amount of the bill, signed by the acceptor, "received J. Davies," was received as evidence of the delivery of the cloth, and of the state of account between the parties, "because, a paper not put in as a receipt, does not "require a stamp." And in Dibdin *v.* Morris, 2 *Car. & P.* 44, a receipt for 52*l.* 10*s.*, upon 1*s.* 6*d.* stamp, which contained these words, "which sum, together with 100*l.* already received, "is in satisfaction of all my claims," was received in defence to an action of assumpsit for work and labour, although it was objected that it should have had a stamp, corresponding to that required for a general discharge, or for the sum of 152*l.* 10*s.*, because it was "only a receipt for 52*l.* 10*s.*, and though it "mentions the previous receipt of the other sum, it is not at all "given as receipt for that sum."

In that case the paper was admitted to prove, by the signature of the party to it, the statement in it, that a previous payment of 100*l.* had been made, and that all claims had been satisfied by the payment of 52*l.* 10*s.*, although the stamp covered only 52*l.* 10*s.* In short, the fact of the paper being a receipt for a particular sum, was not allowed to defeat its effect for other purposes, so here the fact of the paper containing a receipt, cannot defeat its use for other purposes, than to prove the payment of the particular sum it purports had been paid. And in Bennie *v.* Mack, 10 *Sh.* 255, an unstamped paper, bearing, "I have this day got bills and cash from you to the amount "of 55*l.* 4*s.* 6*d.*" was received as evidence of a payment by bills to the amount of 26*l.*, although the paper purported to be a receipt for money.

Mr. Wortley and *Mr. A. M'Neill* for the Respondent.—It is not competent for the Appellant to bring the question raised by the Appeal before the House. The jurisdiction of the House

in Appeals is the creature of statute, and, therefore, unless the Appeal is sanctioned by the statutes it is incompetent. By the 6th sect. of the 55 Geo. III. cap. 42, the Appellants might have applied for a new trial, on the ground of rejection of evidence; and the Interlocutor, upon such an application, could not have been appealed; or by the 7th sect. of the same statute, they might at the trial have excepted to the direction of the Judge, as to the admissibility of evidence; and if their exception had been disallowed, the verdict would have been final. But there is no provision by the statutes admitting of appeal upon the decision of the Court on a question reserved for its decision at the trial, which does not appear, either by the verdict or by a bill of exceptions, but on the notes of the Judge alone, which are no part of the record. The proceeding, though not in form, is in substance, a motion for a new trial, on the ground of undue rejection of evidence, and the judgment of the Court upon it is final, and not subject to appeal.

With regard to the merits, the enactment of the Stamp Act is, that no receipt "shall be pleaded or given in evidence in "any court, or admitted in any court to be good, useful, or "available in law or equity," unless it shall be marked with a lawful stamp. This enactment does not say that the receipt shall not be admitted to be good, useful, or available, to prove the receipt of the particular sum, but generally that it shall not be good, useful, or available for any purpose whatever. The document in question, in the present case, is in express terms a receipt; and though it may not be necessary for the party's purpose to use it to prove payment of the sum mentioned in it, it is equally to defeat the policy of the statute to allow him to use it for the larger and more available purpose of showing the correctness of the sums in the account. He can only do so by reading the receipt, for there is no separate acknowledgment of the correctness of the account; that is only shown by inference from the acknowledgment in the receipt of

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payment of a particular sum, "being balance of amount of "pay-bills." It is impossible, therefore, for the party to prove his case, without using the receipt as such, in direct opposition to the enactments of the statute. To disconnect the receipt from the account and read only the signature, as if it were at the foot of the account, does not mend the matter; that is only another way of attempting the same evasion; for there is no signature except at the foot of the receipt, and plainly it was intended to be only there. Still less is it in the power of the party to disconnect the parts of the receipt itself, and to try to read only that part which acknowledges that a payment made was a balance, discarding that part which acknowledges the payment.

All the cases establish that a receipt, not properly stamped, cannot be used for any purpose beneficial to the party producing it, whatever that purpose may be. In Scott *v.* Burd, 8 *Bell & Mur.* 25, an unstamped receipt was not allowed to be used, to prove against one of two debtors in favour of the other that he had paid the debt, so as to entitle him to contribution. That was a much more favourable case than the present, for the use attempted was not against the original creditor, to show that he had received his money, but against a third party, to show by whom it had been paid. The King *v.* Inhabitants of Castle-morton, 3 *Bar. & Ald.* 588, was a case of a similar nature; there an unstamped lease was not allowed to be read, although the purpose was merely to show the value of the premises let, in a question with the parish as to settlement or no settlement, and not to make the instrument available as a lease against either of the parties to it. So in Hawkins *v.* Warre, 3 *Bar. & Cres.* 690, unstamped receipts for rent were not allowed to be read to prove a tenancy, in defence to an action for alleged illegal seizure of corn for payment of rent. In the King *v.* Hall, 3 *Starkie*, 68, an unstamped receipt produced, not for proving receipt of the money against the party entitled to

receive it, but against a party who had feloniously received and appropriated it, was not allowed to be read. In Jardine *v.* Payne, 1 *Bar. & Ad.* 670, correspondence proved an admission of liability for payment of 57*l.* 10*s.* to the holder of a bill for that amount, and an unstamped bill was then tendered, to show that the Plaintiff was the holder, but it was not allowed to be received.

LORD CHANCELLOR.—The question in this case was, whether a document which was stated to be a receipt of payments, making a balance of 68*l.*, was a receipt, which purported to be a receipt for that sum of 68*l.*, the balance of an account, and whether it was receivable in evidence in a contest between the parties, not being tendered for the purpose of proving the payment of the 68*l.*, but being tendered for the purpose of proving the state of the account as set out in the papers, bringing out a balance of 68*l.*, for which a regular receipt was given.

My Lords, it is contended that inasmuch as this was a document which purported to be a receipt for 68*l.*, it could not be received, not having a proper receipt stamp. On the other hand, it was contended that the document, though not receivable as a receipt, for the purpose of showing the discharge of the 68*l.*, yet inasmuch as it was available for other purposes, unconnected with the fact of 68*l.* having been paid, was not vitiated by the receipt for the 68*l.* having been written on it, and was receivable therefore for the purpose of showing the state of the account as it stood before the receipt for the 68*l.*

Now, my Lords, upon a consideration of the cases that were referred to, both in this country and in Scotland, but particularly in this country, I find that they are so very inconsistent with one another, and they seem, in most instances, to be so little regulated by any fixed rule or principle, that it would be a hopeless task to endeavour to reconcile them. But it does appear to me, that from all the cases a certain principle may be

extracted, which seems to have regulated the minds of the judges who decided those cases, although questions may be raised, undoubtedly, upon many of them, as to the mode in which that principle is to be applied. Now, my Lords, it is perfectly obvious that there are three descriptions of documents upon which this question may be raised. First, a mere discharge for a debt is of course directly within the meaning of the Stamp Act; about that no question can be raised. Another class of cases is where it becomes necessary to prove payment, not for the purpose of showing a discharge as between debtor and creditor, but for what is called a collateral purpose. Now that expression "collateral purpose" seems to me to have been very much misunderstood, and to have led to a great deal of the confusion to be found in the cases. It certainly is a collateral purpose if you produce a receipt, not to show a discharge as between debtor and creditor, but for the purpose of establishing some other fact collateral to the question of payment, as in one of the cases I recollect with regard to the payment of rent by a tenant, where a receipt purporting to be a receipt for former rent, was produced, not for the purpose of showing the discharge of that particular rent, but for the purpose of establishing the fact of tenancy. That is quite collateral to the fact of payment, no doubt, and the receipt was a document used, not for the purpose of showing that the particular sum specified in the receipt had been paid, but for the purpose of shewing, through the means of that receipt, by the fact of money having been paid, that there was the relation of landlord and tenant existing between the parties. My Lords, it appears to me that the great majority of the cases go to shew this, that if in a case the matter to be proved be the payment of money, and the receipt of the money so paid is proved by a document, the Stamp Acts do immediately apply to the document produced for such a purpose, whether it is for a direct purpose as between debtor and creditor, or whether it is for a purpose collateral, that where

a matter collateral is to be proved by the proof of the fact of payment, and that fact of payment is established by a receipt, the receipt is within the provisions of the Stamp Act. That, however, is not the present case: but it does tend very much to reconcile many of the cases which have been referred to, and which at first sight appear difficult to bring within any principle. But, my Lords, there is another class of cases, within which it appears to me the present falls; where the document is indeed a receipt, and purports upon the face of it to be a receipt, but also purports something else, that is to say, as in the cases where an account of debtor and creditor appears set out between the parties, making a certain balance due, and the paper contains a receipt for that supposed balance, whether that balance was paid or not. If the object of the parties be not to prove the fact of that particular balance having been paid, but merely to shew that the parties to the account acknowledge the state of account, as appears by the account, the receipt may be proved for the purpose for which it is produced, whether that balance had been paid or not. It is true, supposing the account stood without any receipt or payment, supposing a balance had not been paid, and the parties had arranged between themselves to ascertain, and settle, how the account stood, or was to be rendered; supposing the items of the account had exactly balanced one another, then there would be no payment, there might be the signature of the parties to the documents, but there would be nothing like a receipt, and nothing to require a stamp. That is exactly the present case, excepting this, that this which is, and also purports to be a receipt for a balance, does not find its way into such a case as that, because there had been no payment and nothing received. But why, because a paper purporting to be a receipt, cannot be used for the purpose of proving that receipt without a stamp, should not be used for another purpose equally apparent upon the face of the paper which does not require a receipt, is a proposition which it seems

to me it is extremely difficult to support by any argument, certainly not by any language to be found in the Stamp Acts, or, I believe, by any authority, although there are some which it might be difficult to deal with.

Now, my Lords, this debtor and creditor account, as it stands upon the face of it, must of course be taken from books. If the party had signed a book instead of signing a paper, could anybody doubt that that would be evidence against the party signing it, as shewing the state of the account? Because the items of payment in the account do not require a stamp—no one contends that they do. It is an acknowledgment of the parties that the account stands as it appears on the face of the book, or as it appears on the face of the paper which is signed. This document made out, and recognised, and acted upon, and signed by the parties, is good evidence of the state of the account for that purpose and that purpose only.

My Lords, without attempting to go through the variety of cases which have been referred to, it does appear to me that this principle will be found to reconcile a great many of them, (although with respect to others there is some difficulty in reconciling them,) as it steers entirely clear of the Stamp Acts, which beyond all doubt it is the duty of all Courts to support, so far as the Legislature intended they should be supported, but which all Courts must be anxious to keep within their proper limits, in order not to deprive parties of evidence of their rights on account of some difficulty supposed to arise from the Stamp Acts. And it is, therefore, the duty of the Court to see that its decisions are kept within the proper bounds. It does not appear to me at all to infringe upon the Stamp Acts, to hold this document admissible for the purpose of evidence, so far as it contains matter not connected with the receipt of money; and, therefore, that the Court below have erred in not permitting this document to be received.

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LORD BROUGHAM.—My Lords, it is undoubtedly the duty of all Courts, as my noble and learned friend has justly observed, to protect the revenue, and to see that the intention of the Legislature is carried into effect, which requires certain documents when produced in evidence for certain purposes, to have a stamp, whereby the revenue has so much gain. But it is not the duty of the Courts to strain the construction of these Stamp Acts, so as, without regarding the object of the Legislature, to deprive parties of the means of evidence, whereby they might maintain on the one side or the other their different contentions before the Courts. This would be to make the Courts instrumental in levying many duties which were not intended to be imposed upon the subject, and would be adding a grievance to that grievance which I am much afraid we must admit that all taxes naturally impose, be they ever so closely kept to their original intention, and be the law imposing them ever so equitably or even mildly administered. Therefore, this being the rule, that we ought only to regard the intention of the Legislature, and not to strain it, giving a larger scope to what is enacted than the Legislature intended should be given, this being the general rule, we come to consider whether the present case has not gone to the outside of that rule and erroneously imposed the obligation of putting a stamp upon an instrument used, not as a receipt but for another purpose. I looked very carefully, as my noble and learned friend near me did, into the different cases which were cited on either side, and which have been cited and very diligently examined, I must say, both by the counsel and the judges in the Court below, and to reconcile all these cases I found to be absolutely hopeless; some of them are Nisi Prius cases, as for instance, The King *v.* Hall, tried before Mr. Justice Bayley, and another on the other side, of Brooks *v.* Dunn, I think tried before Lord Wynford, and also Terbutt *v.* Ambler, which was tried I think before Lord Denman, and reported in *Carrington & Payne.* There are other cases,

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Horne *v.* Redfearn, in the Common Pleas, reported in *4th Bingham*; The King *v.* The Inhabitants of Castlemorton, in *3rd Barnewall* and *Alderson*; and Hawkins *v.* Payne, in the King's Bench; Jardine *v.* Payne, also in the King's Bench; Goodyear *v.* Simpson, I recollect was cited and commented upon; I have not got the reference.

Now, my Lords, all these eight cases I have examined, and have found that it is not possible accurately to reconcile them altogether; one or two of them stand out a good deal in one direction, and one or two as much in the other, and an attempt to reconcile them all would be vain; at the same time, my opinion coincides with that of my noble and learned friend, whom, indeed, I communicated with before, that the rule which we are disposed to follow in this case, and from which I think the Court below has somewhat departed, goes as nearly as possible in the circumstances to a reconcilement of the cases, and leaves very few of them, not perhaps above one or two beyond the scope of it, and not reconcileable by means of it. That rule, I take to be clearly this, that where a document is used for the purpose of proving a receipt of money in any way, it requires a stamp, and when it is said, that if it is used for a collateral purpose it may be given without a stamp, in the case I put, where it is used as evidence of payment of money in any way, it is a receipt used as a receipt, and requiring a receipt stamp before it can be so used, and when the cases as some of them do lay it down, that where it is used for a collateral purpose, it does not require a receipt stamp, I do not think that that is a perfectly accurate, and not always a very intelligible expression; because it may be for a collateral purpose, and yet if it is used in a way to mix up with it the receiving or paying of money, so that upon the whole, a receipt of money is the matter for which, or in respect of which, or connected with which, the document is used, it requires past all doubt to have a stamp, because it is in one

way or another used as a receipt. But if the same document is used for a totally different purpose, it is to me perfectly clear that it is not to be regarded as a receipt. It is not used as a receipt, and therefore the Legislature never intended that it should bear a stamp as a condition precedent to receiving it in evidence. Now suppose an account is produced, in which payments are made on the one side by the party tendering the account, and debiting the party to whom the account is tendered, and in which credits are given on the other side to the same party sought to be charged by the debit side of the account, is it to be said that every entry of a credit, though without question in that case, that entry debits the person making it in favour of the person to whom he gives in the account, the banker or agent, who says, "I have received so "much money to your account," is it to be said that that account is to have a receipt stamp to every one of the entries of payment? Most certainly not. Then suppose the whole balance of account is given at the end, and the account is drawn up in such a way as to shew that balance by comparing the right and left-hand sides thereof together, it is not to be said that because that states a balance against the party, if it is on one side of the account, and in favour of the party, if it is on the other side, it is not to be said that that requires a stamp, or that that is a receipt, and also, in the case put, if an account is tendered with the debit side tallying exactly with the credit side, so that there is no balance, there are a great number of receipts all on one side as receipts, and all on the other side as payments. But nobody would say that that requires a receipt stamp. Now one test whether it is used as a receipt or not is this, would not a document of account between the parties have been a perfectly rational and intelligible account, and a good document to prove the case? Suppose you had with a pair of scissors cut off the receipt altogether, cut off the names, and cut off the receipt, most undoubtedly it would. I think still, with

all regard for the learned counsel who found it necessary to use the receipt that as at present advised, though I have great respect for the very learned counsel who conducted the cause, I should have thought twice before I gave in the receipt, for the purpose of not raising this question, if I possibly could have done without it. It is possible that I may have omitted some considerations which justified them in putting in the receipt. But of this I am perfectly certain, that they did not use it as a receipt, but they used it for another purpose. They did not use it as a receipt, and consequently, as a receipt it was not to be considered, and therefore a stamp was unnecessary. On the whole, therefore, I am clearly of opinion that there has been a miscarriage in the case, though it has been very carefully considered in the Court below, and therefore I come with reluctance to this conclusion.

LORD CAMPBELL.—My Lords, upon the first question raised on this appeal at your Lordships' bar I entertain no doubt at all, and I have entertained no doubt since I first made myself master of the arguments on both sides.

It is strenuously contended on the part of the Respondent that this appeal is incompetent, and that the interlocutor is final, precluding any further proceeding. Now, my Lords, it is quite clear that in the general case, there is an appeal from the Court of Session to your Lordships' House. The *onus*, therefore, lies upon the Respondent to shew how the appeal is taken away in this case, and the Respondent relies upon four sections of the 55 Geo. III., cap. 42. But when those sections are examined, it will be found that it is impossible by any reasoning to say that they bear such a construction as that attempted to be put upon them by the Respondent. The sixth section which is relied on applies exclusively to new trials. Now that is prohibitory. That gives a power to apply to the division of the Court of Session from which the issue is directed for a new

trial, in respect to what may have taken place when the cause was tried, and prohibits any appeal whatsoever to this House or even by way of a reclaiming petition, or in any shape whatever: therefore, where there is an application for a new trial, undoubtedly your Lordships' jurisdiction is abolished.

Then comes the next section, section 7, which admits of bills of exceptions, but there is nothing turning upon that; and it is perfectly consistent that the same question of law may be raised in two different forms, either by tendering a bill of exceptions, or by reserving the point which is in the nature of special case, and although there is a mode expressly given of raising it by a bill of exceptions which clearly may be brought by appeal to this House, that does not at all prevent the other mode by reserving the question for the opinion of the Court, and then the Court determining how the matter shall be dealt with.

Then comes the 8th section, which is likewise expressly confined to a new trial.

Then the 9th section, instead of taking away your Lordships' jurisdiction *ex abundanti cautelâ* preserves it, for it provides "That in all cases whereon the Court shall pronounce a judgment in point of law as applicable to or arising out of the finding by the verdict, it shall be lawful and competent for the party dissatisfied with the said judgment in point of law, to bring the same under review either by representation or reclaiming petition, or by appeal to the House of Lords."

Here the point of law was reserved as to the admissibility of this evidence. The Court have determined how that point of law in their opinion stands, and the right to take the opinion of your Lordships upon that point of law is expressly reserved.

My Lords, clearly the scope of legislation upon this subject was that the determination of facts should be final, but that still there should be the right for the protection of the parties,

and for the uniformity of the law, to take the opinion of your Lordships upon any point of this sort that might arise; therefore, my Lords, there seems to me to be no doubt whatever upon the competency of your Lordships in this case.

With respect to the question of evidence, I must confess that I have in the course of the argument entertained very serious doubt. This being an action brought to recover the balance of an account, *primâ facie* the document called a receipt if stamped would be admissible in evidence to prove that a sum of money had been received. My opinion is that if a document purporting to be a receipt, but unstamped, is offered in evidence for any purpose during a trial, if it would be evidence when stamped as a receipt to establish any point that is litigated between the parties, it cannot be received for a collateral purpose, merely by the parties saying, "I offer it for a collateral purpose, and let "the receipt part be taken *pro non scripto.*" I think, my Lords, you cannot abstract a part of the document in this manner and give the rest in evidence. The criterion, therefore, seems to me to be not whether the party seeks to make use of it as a receipt, but whether it can be made use of as a document to settle any question litigated between the parties, and, my Lords, had this sum of 68*l.* 9*s.* 4*d.* been in dispute, I should have thought that this document would not have been receivable in evidence for any collateral purpose. For only see the danger that would arise. Can the jury be told "You are to discharge from your minds every "thing that applies to the receipt—that is not upon stamped "paper, and therefore it is not in evidence—but you are "to look to the other part of it, and that you are to apply to "another and a collateral purpose?" I think this would be a dangerous doctrine; I find no case that has gone so far; because although the language of the Judges is that it may be given in evidence for a collateral purpose, if you look at the various cases that have been cited, you will find in those cases

it could not have been used as a receipt to prove any issue taken between the parties.

I am very glad, therefore, my Lords, to find that consistently with the notions that I have entertained, as to the rule that ought to guide the Judges in their direction in such cases this document was receivable in evidence, because it is quite clear that the justice of the case requires it, and I should have deeply deplored the necessity of thinking that it ought not to have been admitted.

My Lords, I find that looking at the statement which we have from the learned Judge who presided at the trial, and to which our attention was exclusively directed, he says that "On "the part of the Defenders it was contended that as the "payment of the particular sum of 68*l.* 9*s.* 4*d.* had been "admitted, and as that sum is not included in the demand "made, the paper in question was in no sense whatever used or "required by them as a voucher to instruct payment of that "sum, the payment of that sum not being a matter in dispute "among the parties." I feel myself authorized to come to this conclusion that the payment of that sum was wholly immaterial—was not a question between the parties—and that therefore, if the receipt had been stamped it would have been of no avail whatsoever as a receipt. That being the case it comes within the rule which I think is a sound rule to be laid down upon this subject, that it could not have been used if stamped; and it is not left merely to the party to say, "I do not use it "for this particular purpose."

Under those circumstances, my Lords, I am glad that I quite concur with my noble and learned friends, I think that this document although it contains a receipt for this sum the balance of 68*l.* 9*s.* 4*d.*, as it could not have been used for any effectual purpose respecting that sum ought to have been received for the collateral purpose of identifying the state of the accounts. Under these circumstances I concur with my noble

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and learned friends in advising your Lordships that this judgment should be reversed.

Ordered and Adjudged, That the interlocutors of the 25th of June, 1847, and of the 8th (signed 10th) of July, 1847, complained of in the appeal, be reversed, and that the verdict in the action in the Court below be entered up for the Appellants, and that the said Appellants be assoilzied from the conclusions of the said action. And it is further Ordered, That the Respondent do pay to the said Appellants the costs incurred by them in the Court of Session in the said action. And it is also further Ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

W. O. & W. HUNT—DAVID BARTIE, Agents.

[HEARD *27th March*—JUDGMENT *2nd April*, 1849.]

JAMES ERSKINE WEMYSS, Esq., of Wemyss, and Others, *Appellants.*

JOHN WILSON, Tenant of the Lands of Blacketyside, *Respondent.*

Process.—6 Geo. IV. c. 120.—The proper form of interlocutor to be made by the Court of Session, in reviewing the decree of an inferior Court upon matters of fact proved by commission, where the Court agrees in the result at which the inferior Court arrived, is not to remit simpliciter, but in terms of the 49th section of the Judicature Act to specify distinctly the facts the Court finds to be established by the proof, and how far the interlocutor proceeds on the facts so found, and the points of law meant to be decided.

Appeal.—If the interlocutor appealed from, being an interlocutor upon an advocation of the decree of an inferior Court, in respect of matters proved upon Commission, does merely remit simpliciter, instead of containing specific findings of fact and of law, as required by 49 sect. 6 Geo. IV. cap. 120, the House will not entertain the merits upon the Appeal.

THIS appeal arose out of an action brought before the Sheriff by the Respondent against the Appellant (his landlord), for damages, in respect of injury done to his crops by the game preserved by the Appellant upon the lands occupied by the Respondent.

The Sheriff allowed a proof upon commission, and after advising the proof pronounced an interlocutor, containing a variety of specific findings, which, in the aggregate, found various sums of damage to be due to the Respondent.

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The Appellant carried the case by advocation to the Court of Session, which, on the 2nd of December, 1847, pronounced an interlocutor in these terms:—"Having considered the revised "cases and whole process, and heard counsel repel the reasons "of advocation, remit simpliciter to the Sheriff and decern."

This interlocutor was the subject of appeal.

Mr. Attorney-General and *Mr. Anderson* for the Appellant, in the course of arguing the cause upon the merits, took an objection, suggested by a statement in the printed case for the Respondent, that the interlocutor of the Court below could not be the subject of appeal, inasmuch as it did not by its form comply with the provisions of the 49th sect. of the Judicature Act, 6 Geo. IV., cap. 120, which enacts,—"That when in "causes commenced in any of the Courts of the sheriffs, "or of the magistrates of burghs, or other inferior Courts, "matter of fact shall be disputed, and a proof shall be allowed "and taken according to the present practice, the Court of "Session shall, in reviewing the judgment proceeding on such "proof, distinctly specify in their interlocutor, the several facts "material to the case which they find to be established by the "proof, and express how far their judgment proceeds on the "matter of fact so found, or on matter of law, and the several "points of law which they mean to decide, and the judgment "on the cause thus pronounced shall be subject to appeal to "the House of Lords, in so far only as the same depends on or "is affected by matter of law, but shall in so far as relates to "the facts, be held to have the force and effect of a special "verdict of a jury, finally and conclusively fixing the several "facts specified in the interlocutor."

The House interrupted the counsel for the Appellants, and desired that the counsel for the Respondent would address themselves to the objection upon the form of the interlocutor.

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Mr. Turner and *M. A. M'Neill* for the Respondent.—The facts are specifically found by the sheriff, and the Court by the form of its interlocutor adopted these facts, and in doing so satisfies the enactment of the statute. The universal practice, when the court agrees with the interlocutor of the inferior Court, is to remit *simpliciter*, and not to reiterate the findings of the inferior Court. It could not answer any good end to do so. The Court, therefore, by adopting the findings of the Sheriff has substantially, though not in terms, complied with the directions of the statute.

The cause was allowed to stand over till the 2nd of April, upon an offer that if that were done, the Respondent's counsel would be prepared with precedents, to show that a remit *simpliciter* was the form ordinarily adopted by the Court in such cases; but on the day to which the further hearing was adjourned, no such precedents were forthcoming.

LORD CHANCELLOR.—My Lords, in this case it appears to me that there has been a non-compliance with the terms of the enactment, as set forth in the Respondent's case (6 Geo. IV. chap. 120, sect. 49).

Now, my Lords, when we come to look at the interlocutor appealed from, which is that of the Court of Session, we find not one of these requisites, which the Act of Parliament says must be found in the interlocutor, before this House has any jurisdiction to review it. It does not, therefore, appear to me to be necessary to go further. The affirmance of the interlocutor of the Sheriff does not find every fact that the Sheriff states, and the Act of Parliament provides that you must find that in the interlocutor of the Court of Session. There was a conclusion in the interlocutor different from anything to be found in the terms of the interlocutor of the Sheriff, showing that matter of fact is still in dispute. I proceed entirely upon the language of the Act, and I apprehend that the right course will be merely to dismiss the appeal.

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[*Mr. Attorney-General.*—I apprehend, my Lord, that the course will be to reverse the interlocutor, and remit in the terms of the statute. The Appeal is right, although the interlocutor is wrong.

Lord Chancellor.—Suppose there is no remit, and the House simply dismisses the appeal, the question then is, whether the party can apply to the Court of Session.]

LORD CAMPBELL.—My Lords, I should think that the proper course would be for your Lordships to reverse the interlocutor, upon the special ground that the Act of Parliament has not been complied with, and to remit.

[*Lord Chancellor.*—If it is clearly understood on both sides, that the only way of bringing the alteration of the interlocutor before the Court of Session, will be to reverse the interlocutor and remit, that is no doubt the course the House ought to pursue.]

I do not go so far as to say, that the Court of Session, the Inner House might not specifically, directly, and expressly have said, "We agree *in omnibus* with all that has been found by the Sheriff." If they had done so, the findings of the Sheriff would have been involved in the interlocutor, and we should only have had to deal with the interlocutor of the Court of Session on the findings of the Sheriff.

But then the Act of Parliament perhaps would not have been complied with, I should think the better course would be for the Court of Session to establish the findings originally, and to exercise their own understandings. I think the Act of Parliament is quite clear, that where there are facts contested before the Court of Session, and that are not remitted to a jury, those facts should be found specifically by the Court below, and that when the case comes by appeal before this House, this House should merely have to look at the facts thus specifically found, and be governed by those facts, and determine alone the law which those facts raise.

But, my Lords, when I look to the finding of the Sheriff, it is clear that it does not afford any compliance with the Act; it is a hotch-potch, a mixture of fact and of law; and it does not define in the slightest degree upon what grounds the matter of law proceeds. He puts the cart before the horse. He is to find the facts, and then the law that arises upon those facts. He begins by finding an abstract question of law,—"Finds "that the contract of lease is a contract, *bonæ fidei*, and that as "such it falls to be construed according to the understanding "and intention of the contracting parties at its date." Then he goes on to mix fact and law alternately.

If your Lordships come to the conclusion, that the Court of Session adopted the facts as they are found by the Sheriff, that would be an inference contrary to the fact. They have looked at the evidence, and they have rejected the witnesses, and they have not been governed by the facts.

This appeal from the interlocutor of the Court of Session is upon several grounds. One of them is, that the interlocutor is wrong in point of law. We have not looked to that ground, but there is another ground, which is, that it is not a compliance with the Act of 6 Geo. IV., c. 120. So far we may look at it; and if we do find that it is not a compliance with that Act, we may rest our judgment specifically upon that ground. I apprehend that the order of the House will be to remit, and give no opinion whatever upon the merits, but merely say that the interlocuter is not drawn up in conformity with the Act of Parliament; that the Act must be complied with, and that the Judges must find specifically the facts upon which they proceed, and the points of law which they determine, and then the case may come before your Lordships' House unpon these findings.

LORD BROUGHAM.—I am entirely of the same opinion with my noble and learned friend. The Act of Parliament intended that the law and the facts should be, as it were, sifted and separated the one from the other, as if by the findings in a special

verdict, so as to refer it to this House, that we might not have an appeal, either upon fact or upon fact mixed with law, but upon points of law only. When the 6 Geo. IV., c. 120, sec. 49, was passed, it was the main object of the Legislature to make that separation, and, my Lords, we have a right, by the provision of that Act of Parliament, to have the matter confined in the interlocutor of the Court of Session to an opinion upon matter of fact, and also an opinion upon matter of law, and to have the two separable and capable of being kept separate the one from the other. I do not differ in a single point from my noble and learned friend who last addressed you, as to what would be a sufficient compliance with the requisition of the statute, if the Court of Session, instead of not applying its mind to the facts at all, were merely to adopt what had been done by the other Court below, but it is not, my Lords, necessary to give an opinion upon that. That has not been done here at all. Upon the whole, I am inclined very much to think, that it would be the sounder and the better practice, that the Court of Session should specially find the facts. I think that would be the more convenient and the more correct course to pursue. But, my Lords, *non constat*, that the Court of Session adopted any one finding upon matter of fact. It is perfectly consistent with possibility, nay, it may be even very probable, that the Court of Session came to the conclusion to which they came, that is, remitting to the Sheriff, without agreeing with him in any one point of fact. It is likely, and, as my noble and learned friend near me says, it is pretty clear, that on some points they did not agree with the Sheriff, and, therefore, that question falls to the ground entirely, and it renders it wholly unnecessary to grapple with the point of how far a general agreement of the Court with the Sheriff's finding, would be a sufficient compliance with the statute. There is none here. It is not only perfectly possible, and even very probable, that they did on some points not agree with the Sheriff, but it is possible,

that upon no point did they agree with him. My Lords, I look upon this as a very important question in the practice of appeals; and it is necessary that your Lordships should take a clear course, and let it appear what our judgment is grounded upon.

I think the suggestion of my noble and learned friend who spoke last should be followed, that we should enter the very grounds specifically upon which we reverse the interlocutor, and that being done, no mistake or miscarriage further can arise. At first I thought with my noble and learned friend on the woolsack, that the best course would be to dismiss the appeal, but I now think that that would not be the right course. There must be no alteration in the interlocutor on our part, so as to deal with the question in the cause, but the order must be drawn up, so that it shall appear that it is upon the specific ground of non-compliance with the requisition of the statute, that we do reverse and upon no other.

[*Mr. Attorney General.*—I believe the form is to remit to the Court below, with direction to hear the cause before the whole Court.

Lord Chancellor.—That might be the form in substance, but it would be intimating that there is matter of great importance on the merits. We may individually think that that is so, but the House, by the order they pronounce, is not to be supposed to have looked into the merits at all. We cannot deal with the merits in any way.]

The Lords Spiritual and Temporal, in Parliament assembled, find that the interlocutor of the 2nd (signed 3rd) of December, 1847, complained of in the appeal, by which interlocutor a remit was made simpliciter to the Sheriff, was not in conformity with the provisions hereinafter mentioned, of an Act passed in the sixth year of the reign of His late Majesty King George the Fourth, intituled "An Act for "the better regulating of the forms of process in the Courts of Law in "Scotland," whereby it is enacted amongst other things, "that when

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" in causes commenced in any of the Courts of the Sheriffs, or of the " Magistrates of Burghs, or other inferior Courts, matter of fact shall " be disputed, and a proof shall be allowed and taken according to the " present practice, the Court of Session shall, in reviewing the judg- " ment proceeding on such proof, distinctly specify in their inter- " locutor the several facts material to the case which they find to be " established by the proof, and express how far their judgment pro- " ceeds on the matter of fact so found, or on matter of law, and the " several points of law which they mean to decide, and the judgment " on the cause thus pronounced shall be subject to appeal to the House " of Lords in so far only as the same depends on or is affected by " matter of law, but shall in so far as relates to the facts be held to " have the force and effect of a special verdict of a jury finally and " conclusively fixing the several facts specified in the interlocutor." It is therefore Ordered and Adjudged, That the interlocutor of the 2nd (signed 3rd) of December, 1847, and also the interlocutor of the 17th of December, consequent thereupon, be reversed. And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just.

G. and T. W. WEBSTER—DUNN and DOBIE, Agents.

[*24th April*, 1849.]

JAMES CLELAND, residing near Glasgow, *Appellant.*

MRS. MARY FLEMING, Executrix of the late WILLIAM WEIR, and JOHN FLEMING her husband, *Respondents.*

Process—Jury Trial—Verdict.—Where a party has not complained of a verdict in the manner allowed by the statute, in so far as regards the facts found by it, he cannot in an appeal of the interlocutor applying the verdict complain of the verdict as not being an answer to the questions raised by the issue.

IN the year 1829, Weir procured probate of a will executed by Williamson in the year 1816, whereby he was appointed executor, and he entered into possession of and administered the estate under this title.

In consequence of proceedings adopted by third parties for setting aside this will, Weir, through Thornton his solicitor at Scarborough, made inquiries of the solicitors of the deceased, and he was furnished in September, 1831, with the heads of a will which had been prepared by Williamson in 1821.

In the month of March, 1832, the Appellant became aware of the existence of these heads of a will, and immediately applied to the Ecclesiastical Courts for recal of the probate which had been granted to Weir. In November, 1833, the Appellant succeeded in this application by obtaining decree, setting up the heads of a will as Williamson's last will and testament.

In October, 1833, Weir brought an action of multiple-

poinding of Williamson's estate, in which he called the Appellant and other parties as defenders. And in May, 1834, the Appellant brought an action against Weir which was afterwards insisted in against the Respondents as his representatives for count and reckoning of Williamson's estate and for damages in respect of such part of the estate as might have been lost through Weir's misconduct or failure, to do exact diligence during his administration of it. This action was founded upon allegations that at the time Weir procured probate of the will of 1816, he was aware of the existence of the will of 1821, but, nevertheless, concealed its existence, and took possession of and mal-administered the estate.

The actions of multiplepoinding and of count and reckoning were conjoined. Before ordering any accounts to be taken, the Court directed the following issue to be tried by a jury.

"It being admitted that on the 6th day of July, 1816, the "late Mrs. Williamson, Scarborough, then spouse of Richard "Williamson, of Scarborough, executed a testamentary deed, "by which she appointed the original defender, William Weir, "and another, her executors; and that on the 4th August, "1821, she executed a last will and testament by which the pur- "suer, James Cleland, was declared to be her sole executor as "to her real and personal property.

"Whether the original defender, William Weir, knowing or "believing the existence of the will and testament last men- "tioned, by himself or by another or others wrongfully took, or "from January, 1829, to 24th May, 1834, or during any part of "the said period, wrongfully retained possession of all or any "part of the property or effects of the said Mrs. Williamson, "or wrongfully excluded the pursuer from the possession of "the same?"

On the 6th of August, 1847, the jury returned the following verdict:—

"In regard to the period from the demise of Mrs. William-

" son to 19th September, 1831, find for the defenders; but " from September, 1831, when direct information was com- " municated by Mr. Thornton to Mr. Wallace of the fact that " he had possession of a deed which rendered Mr. Cleland sole " executor, forward to March, 1832, find that Mr. Weir acted " blameably in not communicating such information to Mr. " Cleland, but, whether in the defender's opposition to the " pursuer obtaining probate on the heads of appointment in the " Court of England, after the pursuer instituted his suit in " March, 1832, or in raising the Multiplepoinding in this Court " after the pursuer obtained the judgment of the English Court " in 1833, revoking probate of the will of 1816, the defender is " to be held as wrongfully retaining possession of the property " of Mrs. Williamson, or wrongfully excluded the pursuer from " possession of the same by such proceedings, the jury, these " being wholly or mainly questions of law, cannot say, and " leave to the Court to decide."

Thereafter notice was given by each of the parties of a motion to apply the judgment in favour of himself, and upon the coming on of these motions, the Court on the 11th of March, 1848, pronounced the following interlocutor:—" Having " heard counsel for the parties on the motions to apply the " verdict by the jury in this cause, and also on the points re- " served for the consideration of the Court, enter up the verdict " for the defenders, and find that the late William Weir did not " by himself, or another, or others, wrongfully take, or from " January, 1829, to the 24th day of May, 1834, or during any " part of the said period wrongfully retain, possession of all or " any part of the property or effects of the deceased Mrs. Wil- " liamson, or wrongfully excluded the pursuer from the posses- " sion of the same. But find, in terms of the said verdict, that " from September, 1831, when direct information was commu- " nicated by Mr. Thornton to Mr. Wallace of the fact that he " had possession of a deed which rendered Mr. Cleland sole

" executor forward to March, 1832, Mr. Weir acted blameably " in not communicating such information to Mr. Cleland, and " remit to Mr. Donald Lindsay, Accountant, to proceed with " the accounting on the principle of the above findings. Find " neither party entitled to the expense of the first trial, but find " the defenders entitled to the expense of the second trial, and " the expense of the motion for applying the verdict, allow an " account of the said expenses to be lodged, and remit to the " auditor to tax the same, and to report. Find neither party " entitled to the expense of this day's discussion."

The appeal was against this interlocutor.

Mr. Wortley and *Mr. Anderson* for the Appellant.—The verdict returned by the jury does not answer the questions put to them by the issue. The question by the issue was whether Weir wrongfully took, or from January 1829, to 24th May, 1834, or during any part of that period, wrongfully retained possession of Williamson's estate. The verdict divides the time into three periods; first, from the death of Williamson to the 19th September, 1831; second, from September, 1831, to March, 1832; third from March, 1832, until the proceedings in the conjoined action. With regard to the first of these periods, the verdict answers the question put by the issue as it finds generally for the Respondents, and if this finding could be separated from the rest of the verdict, it would be unobjectionable; but this cannot be done, the whole verdict must stand or fall together.

With regard to the second period, from September, 1831, to March, 1832, the verdict does not return any answer to the issue; the question put was as to wrongful taking or retaining possession of property, but the answer is in regard to blameable non-communication of information. And as to the third period. the jury decline in terms to give any answer, and leave it to the Court as matter of law.

The verdict, therefore, is not an answer to the issue, unless indeed the word "blameable" is to be read as synonymous with "wrongful," for which there is no authority. And if that were so, the Court was bound by its interlocutor applying the verdict to give that effect to it. But the interlocutor does the reverse, for it finds that from January, 1829, to May, 1834, there was no wrongful taking or exclusion of possession, thereby assuming that "blameable" was not equivalent to "wrongful," and declaring that there had not been wrongful conduct, without any answer from the jury as to whether there had or not.

[*Lord Chancellor.*—How will negativing any wrong affect the account directed to be taken?

It will deprive the Appellant of his right to the mesne profits.

Lord Chancellor.—What should the Court have done then?

It ought to have arrested judgment and ordered a new trial.

Lord Chancellor.—If the finding of the verdict was not proper, it is the Appellants, fault that he did not bring it before the Court in the way allowed by the statute; the verdict is conclusive of the facts found by it. The only question is what the Court should have done upon the facts found.]

By the statute the verdict, if not complained of, no doubt is conclusive, but it is conclusive only as to those facts which are put in issue. Here the facts found are beside the issue,—there was no question as to communication of information, but as to possession or retention of property. Whatever might be the effect of blameable non-communication of information in the circumstances of the case, and it is not very obvious what that would be, the Court was not warranted in the inference of a conclusion which was directly put to the jury as a question of fact, viz., whether there had not been wrongful retention of property, without any answer having been returned by the jury to that question. In this respect, admitting that the Appellant is too late to complain of the verdict, he is within the 9th sect. of the 55 George III., cap. 42, and entitled to complain of the inter-

locutor applying the verdict as giving it an application of which it is not capable from its terms. Campbell *v.* Campbell, *McL. & Rob.* 387.

[*Lord Campbell.*—The verdict finds facts—whether these facts were wrongful was a question of law, and it was for the Court to say whether they were so.

Lord Chancellor.—It is open to the Appellant to argue that the Court should have found the facts to be wrongful.]

From the time that he became acquainted with the existence of the will of 1821, the Respondent was deprived of all plea of *bonâ fides*, in his possession, Woolley *v.* Clark, 5 *Bar & Ald.* 744—at all events he was in *mala fide* to resist probate of that will, and still more so in bringing the action of multiple-poinding after probate had been granted, and if this had been found, he must in the accounting have been treated as one in wrongful possession, and bound to account accordingly.

Mr. Rolt and *Mr. Adolphus* for the Respondents.

LORD CHANCELLOR.—My Lords, this case undoubtedly has been conducted below in a way which one has some reason to lament, from the uncertainty which has been left upon the facts, notwithstanding all the care that has been taken to have them properly ascertained by means of a jury.

The claim being against the Defender, Mr. Weir, and he being charged by a party who has a right to administer the estate under a will ultimately established to be the last will, it was thought right to direct an issue, for the purpose of ascertaining the position in which the Defender stood, and of enabling the Court to decide in what way he was to be charged with the property which he had received during the time he acted as executor.

After stating that it was admitted that the late Mrs. Williamson executed a will of the 8th of July, 1816, which was the first will, and that on the 4th of August, 1821, she executed

another will which of course was the last will, the issue is directed in these words,—" Whether the original Defender, " William Weir, knowing or believing the existence of the will " and testament last mentioned, by himself or by another or " others, wrongfully took, or from January, 1829, to 24th May, " 1834, or during any part of the said period, wrongfully " retained possession of all, or any part of the property or effects " of the said Mrs. Williamson, or wrongfully excluded the " Pursuer from the possession of the same."

Under that issue it was competent of course for the Pursuer to make out the best case he could, for the purpose of shewing the wrongful possession and the wrongful retainer of the property. The case having been tried, the jury find certain facts, they divide the period and they negative the wrongful possession at an earlier period. They say in regard to the period from the demise of Mrs. Williamson to September, 1831, they find for the Defender, negativing therefore the wrong imputed to him, and that is not in dispute, " But from September, 1831, when " direct information was communicated by Mr. Thornton to " Mr. Wallace of the fact that he had possession of a deed " which rendered Mr. Cleland sole executor, forward to March, " 1832, find that Mr. Weir acted blameably in not communica- " ting such information to Mr. Cleland, but whether in the " Defender's opposition to the Pursuer's obtaining probate on " the heads of appointment in the Court of England after the " Pursuer instituted his suit in March, 1832, or in raising the " multiplepoinding in this Court after the Pursuer obtained " the judgment of the English Court in 1833, revoking probate " of the will of 1816, the Defender is to be held as wrongfully " retaining possession of the property of Mrs. Williamson, or " wrongfully excluded the Pursuer from possession of the same " by such proceedings, the jury, these being wholly or mainly " questions of law, cannot say, and leave to the Court to " decide." Then there is a note which may not be considered

as properly part of the verdict,—" The jury explained that they " used the word 'blameably' as something short of the term " 'wrongfully' in the issue." That, in fact, is to be implied from the verdict itself without the note, because they distinguish between the retaining possession and the acting blameably. The question of wrong, by which they mean I presume legal wrong, they leave to the Court.

That verdict undoubtedly is not very happily expressed. But still I do not think there is any doubt as to what the meaning of the jury was, or as to the true construction to be put upon their verdict. As to the first period they find for the Defender. They negative therefore the wrong. As to the second, they find certain facts, and although they do not find them as a substantive finding, I think there is no doubt that the Court dealing with this verdict were entitled to consider this as a fact,—that in September, 1831, direct information was communicated to Mr. Thornton, and by Mr. Thornton to Mr. Wallace, of the fact that he had possession of a deed which rendered Mr. Cleland sole executor, and that Mr. Weir was blameable for not communicating such information.

The fact then as found by the jury is, that in September, 1831, Mr. Weir had information of the existence of a subsequent deed, and that he did not communicate that information to Mr. Cleland, Mr. Cleland being appointed executor under the second will. Those are the only facts which they find. They do not find any dealing with the property during that period, but they find the simple fact of information being communicated to Mr. Weir, and not being communicated by him to Mr. Cleland. Then the other facts which they also rather assume than state, and about which there can be no doubt, are, that the Defender resists the probate claimed by Mr. Cleland, and that he institutes a suit of multiple-poinding. Those are the two other facts.

Before I consider how the Court dealt with that verdict,

I must consider how far it is competent to the Appellant to object to the verdict, or to raise any question as to the mode in which it is given. The verdict was not quarrelled with by either party in the only mode in which it could be brought under the consideration of the Court below. They permitted the time to go by within which they could have brought it before the Court of Session. Neither party complained at the time, but at a subsequent period when by the act the verdict was conclusive and final as to the facts found by it, the Pursuer it appears applied to the Court for the purpose of getting judgment upon the verdict. Now the Act of Parliament says that the verdict shall be final as to the facts found by it. It is final, therefore, as to the first period; it is final as to the fact of information in September, 1831, having been communicated to Mr. Weir, and not by him communicated to Mr. Cleland. It is final as to the resistance of the probate applied for by Mr. Cleland, and it is final as to the fact of a multiplepoinding having been raised. Those are the only facts found; and when upon the application of the Pursuer, the Court had to consider what was to be done with the verdict, or with the case with the assistance of the verdict, which the jury had found, the Court had those facts established and no others, as far as now appears. Well then the Court says, We concur in the verdict, that is to say, we act on the verdict; and with regard to the first period, there is no question raised by either party. With regard to the second period, the verdict has found Mr. Weir to be blameable, but it negatives that his conduct was wrongful; and the question really is whether upon those simple facts so found by the jury in their verdict, the Court were right in treating his conduct as not wrongful, merely adopting the expression used by the jury in their verdict—that it was blameable.

Now the first point raised by the Appellant is, that this verdict, although not capable of being impeached or set aside,

is to be treated as a nullity. Why is it to be treated as a nullity? Does it find no facts? Does it not give the Court of Session some information at least? If it does not find all the information which the Pursuer thinks he could bring to bear upon the case which he had to make, he has only himself to thank for that. It was an issue directed under which he might have brought forward any case he had to make against Mr. Weir; he must be presumed to have been satisfied with the case he made from his not quarrelling with the verdict; and he is contented to ask the Court of Session for its judgment upon the facts found and stated in that verdict. Now whether that verdict would or would not justify the Court in giving an ultimate judgment in his favour, he cannot complain that in the course of the proceedings anything has been done impeding him in proving the case which he assumed to prove against Mr. Weir by the proceeding which he instituted. He proved what he could prove; he had the facts if he could establish them; and he did not, by some other proceeding impeaching the finding of the jury, complain to the Court that he was impeded in the mode of making out his case. He was contented, in short, with his case as it stood upon the verdict. It would be very strange if after that, he were permitted now to appeal from the judgment of the Court of Session upon his application to apply the verdict, and to ask the judgment of this House that there ought to be no judgment at all upon the verdict, for that the verdict is good for nothing: that although he had treated it as sufficient to enable him to ask the Court of Session for judgment in his favor, yet when the judgment appeared not likely to be in his favor, then he should impeach the verdict, and ask this House to treat it as a mere nullity.

I find that some cases were referred to as authorities to shew that it was competent to the Pursuer to adopt this course. The case of Campbell *v.* Campbell was referred to. Now certainly in reading the report of Campbell *v.* Campbell, to the

extent only of an observation which fell from one of the noble Lords who heard that case, and which observation was not intended as a decision upon the case, but was a question put to the counsel, there are some expressions to be found, upon which it might be supposed, if it had been the judgment of the House, and not a question put to the counsel during the argument, that something like an argument could be rested. But what was the result of the case? There a verdict had been obtained, an application had been made to the Court of Session for a new trial; that application had been refused, and the Court of Session applied the verdict and gave their judgment upon the fact found by the verdict. The party against whom the judgment was pronounced, the Defender, appealed, first of all raising a question as to the verdict and seeking to open it. It came twice before this House upon a question of competency: and upon the first application, as might have been expected, he was told that the verdict by the Act of Parliament was final, that what had been done below could not be reviewed by this House under the Act of Parliament; and that whatever might become of the case, they must deal with it upon the facts which the verdict had found between the parties. Then there came another appeal, and that appeal was not touching the question of the verdict, but it was against the interlocutor applying the verdict.

What is the judgment of this House in disposing of that case? The case came I think before Lord Lyndhurst, who was Chancellor at the time the second appeal came before the House. He says, "Under these circumstances the finding of "the jury is one that cannot now be disturbed, inasmuch as an "application was made to the Court of Session for a new trial, "and the Court of Session refused a new trial, and against that "interlocutor refusing a new trial no appeal can be presented "to your Lordships' House. The present appeal is against the "interlocutor giving effect to the verdict of the jury, that is to

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"say, the jury having found that the Defenders are indebted "and resting owing to the Pursuer in a certain sum, the inter- "locutor decreed that payment should be made. It is for the "Appellant to consider how far, in prosecuting this appeal, he "is likely to succeed." The House decided that it was competent for a party to appeal against an interlocutor applying a verdict, although the opportunity of questioning the verdict had passed by. But then Lord Lyndhurst says, You may appeal, but you must consider what chance you have of succeeding, because you are now fettered by the verdict finding the fact of there being a certain sum due and owing, and you come to the House questioning the interlocutor of the Court of Session applying that verdict, and directing payment of the sum so found due; therefore he naturally enough says to the Appellant, You must consider what chance you have under those circumstances of succeeding in your appeal.

How that can be an authority in favor of the party here appealing, I cannot at all see; but that it is very much in favor of the Respondents is perfectly obvious; because there also, as here, the verdict of the jury was conclusive—it was final; and the party coming to question the interlocutor applying that verdict, was bound to take the case fettered with that verdict, and to shew that the interlocutor was wrong, assuming that the verdict was right.

This verdict came before the Court with those facts found upon the face of it, and no others; and the Court apparently dealt with the case upon those simple facts. The Court says, With regard to the first period there is no question. With regard to the second period what do they find? I am not now referring to the language, but to the conclusion to which the interlocutor shews they came. They enter a verdict for the Defender, and they find "that the late William Weir did not, "by himself, or another, or others, wrongfully take, or from "January, 1829, to the 24th day of May, 1834, or during any

" part of the said period, wrongfully retain possession of all or " any part of the property or effects of the deceased Mrs. Wil- " liamson, or wrongfully exclude the Pursuer from the pos- " session of the same, but find, in terms of the said verdict, " that from September, 1831, when direct information was com- " municated by Mr. Thornton to Mr. Wallace of the fact, that " he had possession of a deed which rendered Mr. Cleland " sole executor forward to March, 1832, that Mr. Weir acted " blameably in not communicating such information to Mrs. " Cleland; and remit to Mr. Donald Lindsay, Accountant, to " proceed with the accounting on the principle of the above " finding."

The account was at all events to go on. The party had been in receipt and administration of the estate, under the authority of a probate, which turned out not to have been a proper probate, inasmuch as there was another will at the time existing, although it was not known to exist at the time probate was granted, which showed that another person was the party to whom probate should have been granted, if that second will had been known at the time. They say, therefore, account you must, and the question we have to decide is, whether, inasmuch as you had notice in 1831, and did not communicate that notice to Mr. Weir, you are to be dealt with as a wrongful intromitter during that period. What the effect of that wrongful intromission would have been is not material in the view that I take of this case; because, being of opinion that there was nothing upon the face of the verdict which called upon the Court to deal with Mr. Weir, as improperly in possession during the interval, that question does not arise. The simple fact which is found is, that he knew of the existence of the deed, and did not communicate it. He knew it in September, and at the end of March following the suit was instituted for the probate. What do we find to have been done in the mean time? No facts are found. The simple fact found is, that he had know-

ledge of the deed existing, and did not communicate it. When Mr. Cleland became informed of it, or how it was that the knowledge which was communicated to Mr. Cleland, gave rise to the proceeding in March following, does not appear. There is the naked fact, that he had information, and that that information was not communicated by him.

Now, my Lords, the propriety of communicating the fact, in a moral point of view, one can hardly dispute, but the question is, whether such transactions took place as to make it legally wrong, so as to affect him in the mode in which he is to account for this property. A man may hear of a fact, he may have good reason for doubting it, he may properly take time to enquire into it, and a variety of circumstances may exist which are not found here at all, and are not facts upon which the Court can proceed, for the Court knows nothing at all about them; but the Court has the simple fact of notice being communicated to him, and by him not communicated, and I think that to do what the Appellant now asks us to do, would be going a great deal farther than was even done in the case referred to of Woolley *v.* Clark, which was a case of English law and not of Scotch law, but there there was a dealing with the property. I cannot, however, pass by that case altogether without asking myself what would be the result of carrying that decision out, because there we find that there being no knowledge of any other will at the time, a party had improperly obtained probate of a will, by which he was appointed an executor; and he having administered the estate to a certain extent, another will was afterwards produced, and he was made to account; that is to say, there was recovered in an action, at the suit of the executor of the second will, not only property which the party had to be administered, but all the property which had come to his hands, although he had administered the estate, and was then a creditor of the estate to the extent to which he had administered. He might have been at the time

perfectly ignorant of there being anybody else entitled, or that any question could be raised as to his right to administer the property*. We find it stated in the report, "It was contended "on the part of the Defendant, that the revocation of the probate "of the first will did not avoid all the mesne acts, but that "the Defendants might show due administration of the assets "to the amount of the value of the goods.' The Lord Chief "Justice would not allow the Defendants to give evidence "of administration of the assets." He may, therefore, have administered assets to the amount of 10,000*l.* He may have had in his hands property to the value of 10,000*l.*, to which he had a right to look to reimburse him what he had expended on the estate. And the effect of that as reported would be, that the 10,000*l.* worth of property which he had in hands, would be taken from him as part of the assets, and he would be left with a loss of 10,000*l.* My Lords, that case not being before us, and the facts not being before us, I will not say much more about it, because it certainly has no application to the present case, inasmuch as there the fact was found of a dealing with the property after notice, and here there are no facts found, except the simple fact of the notice being communicated at one time and not communicated at another; but before the expiration of six months, we find a suit instituted for the purpose of recalling the probate.

Now, my Lords, there is no question here as to accounting. Cases have been referred to where the question has arisen, whether a party is to account for profits, his conduct being *in malâ fide*, or whether his conduct was *in bonâ fide*, in which case he could not be called upon to account at all. I cannot see the application of those cases to the present, because that the executor, Mr. Weir, is liable to account for the estate cannot be disputed, and in accounting I suppose he ought to have his discharge for what he has paid. But according to the case

* The executor was aware of the first will at the time he sold the property. See 5 *Bar.* & *Ald.*, 744.

referred to, for what he had received he would have to account, and what he had paid away he would not be allowed. Whether that be the law of England I will not say. It may be the law of England although not the law of Scotland, that a man, acting in good faith under the judgment of the Court that he is executor, and entitled to administer the estate, does so at his peril, viz., at the peril of not being allowed any of his payments, if it should turn out at a subsequent period, the fact not being known to him at the time, that there is another will, of which he knew nothing, under which another party may be found, at some future period, to be clothed with the character which he thought he himself possessed. I do not go further into the consideration of that case; I have observed upon it, so far as is material to distinguish it from the present, but upon the naked facts stated in this verdict, my opinion is, that the Court of Session have come to the right conclusion, and that, although there might be a moral duty upon Mr. Weir to communicate all that he had heard, to the party who was to take the benefit of that information if it turned out to be true; yet, that the mere effect of that knowledge coming to him, and not being communicated to another, would not convert his possession of the property from a rightful to a wrongful possession, or make him a wrongful intromitter in the sense in which that term is to be understood.

The result, therefore, will be, that I advise your Lordships to affirm the interlocutor appealed from with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. I consider that what he has stated in the last sentence of his argument, is a perfectly sound and just view of this case, and I should not have done more than express my entire concurrence with the result at which he has arrived, and at which I have myself also arrived, had it not been that mention has been made of the case of Woolley *v.*

Clark. I do not think it necessary, any more than my noble and learned friend thought it necessary, to say anything upon the case of Woolley *v.* Clark, because I do not consider that case to be applicable to the present, and this present case does not require us to say aye or nay, whether we approve of that case. But I will venture to say, that upon looking at the case of Woolley *v.* Clark, I do hope that when that case comes to be quoted in the Courts below, it will be most carefully considered and reconsidered before it is followed as a ruling and binding authority by those courts. Those other cases were not cited in the argument of Woolley *v.* Clark by myself. Of course I could not be expected to cite them, because they would have made against me as counsel with Mr. Chitty, in showing cause against the rule which had been obtained, and the learned Solicitor-General (Lord Lyndhurst) omitted to cite them, but Mr. Justice Williams, (then Mr. Edward Vaughan Williams,) has cited them in his very excellent book on the Law of Executors and Administrators, which is one of the most valuable books ever given to the profession, and he has stated most justly, that those cases were not quoted, consequently, those cases were not brought to the knowledge of the Court, and, therefore, (says he,) were not held to have been overruled by Woolley *v.* Clark. But not only they cannot be said to have been overruled by Woolley *v.* Clark, but *non constat*, that if they had been brought to the knowledge of the Court, they would not have overruled Woolley *v.* Clark, or rather have prevented Woolley *v.* Clark from taking the course it did. However, upon that I say nothing; I give no opinion upon Woolley *v.* Clark, because I am not called upon to give that opinion further than this, that I hope whenever Woolley *v.* Clark is mentioned again, and relied on again, it will be reconsidered, and fully considered.

CLELAND *v.* WEIR.—24th April, 1849.

LORD CAMPBELL.—My Lords, I have very little to add to what has fallen from my noble and learned friends; and really I think this case is free from all difficulty.

The first point which has been made at the bar respecting the interlocutor being contrary to the law, because there was not a majority of the Court in its favour, is clearly unsustainable, for the interlocutor is in the regular form, "Edinburgh," such a day, and such and such a judgment given. We cannot upon the short-hand writer's notes of the reasons which were given, be asked to say whether, upon those reasons, the learned Judges must be supposed to have voted on the one side or on the other. We cannot go into such a speculation. The record states that there was that judgment of the Court, and by that record we must be bound.

With respect to the objection to the verdict that it does not exhaust the terms of the issue, and that, therefore, the judgment should be arrested and followed by a *venire de novo*, I think that to allow that objection would be expressly defeating the Act of Parliament. The verdict has been given, and it was not objected to within the proper time; therefore it stands, and the facts there found must be considered as having been established.

The only question which has been considered as debateable (and it has been debated very ably on the part of the counsel for the Appellant,) is whether, taking the facts found by the verdict of the jury, they establish in point of law that Mr. Weir was wrongfully in possession of this property. That is the question, and the only question. For the reasons which have been given by my noble and learned friend, the Lord Chancellor, it seems to me to be quite clear that these facts are not by the law of Scotland sufficient to shew that Mr. Weir was wrongfully in possession. It is quite clear that the onus is upon the Appellants to shew that the facts which are found by the jury would, according to the law of Scotland, make Mr. Weir, from the date

to which they point, what we should call an Executor *de son tort*. That onus lies upon them; and what authority have they produced? They have shewn no dictum and no decision for holding that a person in possession of property in his hands as executor, and who has merely some moral blame for not communicating information of another will, is a wrongful possessor; but it lies on them to shew the principle on which they say that the facts amount to satisfactory proof of wrongful intromission. Those cases which have been cited with respect to sums of money received and spent *bonâ fide*, do not in the slightest degree apply, because there the question was whether the party should account or not. Here the question is upon what principle he is to account? It being allowed on all hands that he is to account upon the question whether any distinction exists, as to the principle upon which he is to account, no authority has been cited. But it seems to me that none of the facts which have been found by the jury at all warrant us in coming to the conclusion that he was wrongfully in possession. I therefore concur with my noble and learned friends in thinking that this interlocutor must be affirmed.

[*Mr. S. Wortley.*—With respect to the costs, will your Lordships allow me to make one observation? It is quite clear that one of the Judges must have withdrawn his vote in order to produce a majority.

Mr. Rolt.—No, that is not the case.

Mr. S. Wortley.—In the previous case, under those circumstances, your Lordships did not give costs. In the case of Maule *v.* Moncrieffe, the language of the Lord Chancellor was this, "The Court was equally divided, and they had two courses "to take, either to retain that equal division and to send for the "consulted Judges, which they did not do, or to adopt the "course which they did adopt, and which brings the case here, "the Lord Justice Clerk saying, 'I withdraw my vote as a "'judge, and leave you to be two to one in favour of the inter-

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" 'locutor of the Lord Ordinary, in order that it may go to the " 'House of Lords.' Now, my Lords," says my Lord Chancellor, "this is stronger than a recommendation of a Judge to " appeal, which I look to as material in weighing the question of " costs." In this case it is manifest from the printed opinions that two of their Lordships were in favour of the Appellant.

Lord Campbell.—That is not at all clear.

Mr. S. Wortley.—In that case it only appeared from the opinions of the Judges that that was the course taken.

Lord Brougham.—We cannot go on speculation.

Lord Chancellor.—The common rule must be followed.]

Ordered and Adjudged, That the Petition and Appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

DUNN and DOBIE,—TATHAM, UPTON, and Co., Agents.

[*26th April*, 1849.]

Ex Parte MRS. FRANCES C. RENNIE, with consent of R. RENNIE, her husband, as her Curator, and Administrator in law, and him for his interest, *Appellant.*

Curator Bonis—Trustee.—A *curator bonis* is not entitled to make any other profit by his office than the commission usually allowed to him.

ROBERTSON left a will, by which, among other things, he gave the Appellant (his sister) a life interest in the residuary income of his estate, and appointed Barclay trustee.

In 1835, Barclay, assuming to act under a power in the will for the appointment of new trustees, executed an assignation in trust, whereby he made over the whole estate to Ritchie, who had made advances for the estate to the extent of between four and five hundred pounds. The purposes of this deed were, in the first place, to pay off an heritable bond and the interest of the debt owing to Ritchie himself, and then to pay the Appellant such a sum yearly as might be considered to be warranted, not exceeding 60*l.*; Ritchie accepted of this assignation, and entered under it to the possession of the trust estate.

In the year 1837, Ritchie brought an action to have it found that the assignation by Barclay in his favour was a binding deed, and for payment of the sums which were by it ascertained to be due to him in respect of the trust estate. And the Appellant brought a counter action to have it declared that the assignation was null and void. These actions terminated in a judgment of the House of Lords, declaring the assignation to be invalid.—4 *Bell's App. Ca.* 247.

During the course of these proceedings Crawford was appointed *curator bonis* by the Court of Session for the protection

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of the trust estate. Afterwards Crawford's private interest conflicting with his duty as *curator bonis*, he resigned the office, and Morison was appointed in his stead on the 10th of March, 1841, upon an application presented to the Court of Session, in the name of the Appellant and her husband.

In the month of April, 1845, the judgment was made declaring the trust assignation to be invalid, and an interlocutor of the Court of Session applying that judgment was shortly afterwards pronounced, whereby Ritchie was ordered to give up possession of the trust estate to Morison.

In May 1846, Morison presented a petition to the Court of Session for a remit to the Auditor to audit and examine his accounts as *curator bonis*, and for decree for payment of the balance which might be reported to be due to him, and for exoneration of himself and his cautioner. Along with this petition, Morison produced accounts, in which he charged as *curator bonis*, a commission of five per cent. upon the amount of the trust estate which had come to his hand, and a variety of accounts for "factory" and "miscellaneous" business incurred to him in his professional capacity as a law agent, in regard to the trust estate. The Auditor allowed the commission charged by Morison, and likewise his accounts of business. The Appellant objected to the allowance of the business accounts; but the Court (on the 10th July, 1847,) overruled her objections, and, after ascertaining the balance due to Morison upon his curatory accounts, exonerated him and his cautioners of his intromissions, and granted warrant for payment of the balance out of a sum forming part of the trust estate, which had been consigned in bank.

The Appellant complained by her appeal of the interlocutor, of the Court of Session, in so far as it had overruled her objections, and allowed Morison credit in account for his business charges.

Mr. McQueen for the Appellant.—It is not legal for any

party holding a fiduciary office to make profit thereby. That rule has been recognised in the law of Scotland, so early at least as the year 1639, when in the case of Musket *v.* Dog, *Mor.* 9456, the Court declared it illegal for a tutor at law to make profit to himself from the estate of his pupil by selling the office of factor under him. Again in Scot *v.* Strachan, *Mor.* 13433, the Court refused action upon an obligation given by the relations of a minor for payment of 100*l.* to the obligee, in case he would undertake the office of tutor dative of the minor. And in McDonald *v.* Muir, *Mor.* 13437, the Court refused to allow a claim in account made by a tutor against his minor for an allowance in respect of the risk run by him, in making an advantageous purchase of lands, that the minor, on coming of age, would not ratify the purchase. The principle acted upon in all of these cases was that a trustee could not make benefit by his office. That very question was decided in Johnston's Trustees *v.* His Creditors, *Morr.* 13407, and in later times, this House in Home *v.* Pringle, 2 *Rob. App. Ca.* 438, recognised the principle in very strong terms, though the question did not come before it in such a shape as to call for decision.

Such being the law of Scotland, as certainly as it is familiarly the law of England, the only question can be in regard to the nature of the office of *curator bonis*, whether it is one of trust or not. Of that there can be no doubt, for his duty is simply to get in and protect the estate under his charge, and if that duty be attended with the sacrifice of more labour and time than he can devote, he is authorised to employ a factor under him. No doubt it has been the practice in Scotland to allow a curator a commission on the amount of the estate under his curatory. In this respect the practice has introduced an anomaly which the Appellant has no desire to disturb,—but the decree in the present case has not only sanctioned that allowance, but has also given payment of professional charges in respect of the same expenditure of time and trouble for which the commission can alone be considered payable. If these charges

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are allowed, there is no duty performed in respect of which the commission could be payable, and on this ground alone even if the party were not a trustee, the decree cannot stand.

LORD CHANCELLOR.—My Lords, in the absence of the Respondent, who has not thought proper to come here to defend the order he has got in the Court below; and, in the absence of any authority amongst those which have been referred to, shewing a different rule, it seems to me that that which the justice of all these cases requires, ought to be acted upon, namely, that a party in a fiduciary character should not be allowed to charge anything in the way of profit. Such a party cannot make his office one of profit beyond the profit which is incident to that office. Here is an office under which a party has charged five per cent. for the trouble belonging to the office of *curator bonorum*. He has, besides that, brought in a bill, in which he seems to charge for every thing he has done, in addition to the five per cent. referable to his office. But if he is paid for every act he does, what is the five per cent. for?

In looking to the items, it seems that some portion of the charges, at least, is for money actually expended. Though he was entitled to his five per cent. profit, he ought not to be put to the expense of providing documents, or be called upon to make other expenditure, which the estate does not afford to him, in the discharge of his office. It seems to me, therefore, that the course will be to declare that he is entitled to the repayment of any money which he is out of pocket, but that he is not entitled to any profit arising from his employment, which constitutes the matter of this bill. Under these circumstances, therefore, the course will be, to refer the report back to the Auditor, and to call upon him to review the report he has made.

LORD CAMPBELL.—My Lords, I entirely concur with the noble and learned Lord on the woolsack that this case must be remitted, and the Auditor be called upon to review his report.

I have no doubt that according to the rule prevailing here, a

trustee cannot make a profit of his office. He is entitled to be repaid all disbursements, but he cannot make a profit of his trusteeship. I assume that to be the law of Scotland unless the contrary be proved. But I am satisfied according to the decisions and practice in Scotland, that the same rule prevails there as in this part of the United Kingdom. I do not understand that the Judges intimate that they can for any particular case lay down a different rule from that which is the established one. It is not a matter of practice, it is an universal principle, and must be acted upon. They cannot pass an act of sederunt, whereby they shall alter a rule from a particular day, and say, hereafter a trustee shall not be allowed to make a profit of his office, or shall be allowed to make a profit of his office. The rule is one which they are bound to declare, they cannot make it. And that rule is the same in Scotland as in England, that a trustee cannot make a profit as a trustee. Therefore, these exceptions, some of them, ought to have been allowed. We find a general rule, and the account must be settled upon the general principle.

It is declared, that the Respondent is not to charge against the estate of the late Lieutenant Robertson, in the said cause mentioned, any professional charges, or charges for loss of time, or other profit or emoluments, save and except his commission as *curator bonis*, already allowed to him by the said interlocutor; but that he is entitled to all such charges and expenses actually paid by him out of pocket, as shall appear to have been properly incurred and paid by him, and not covered by his said commission as *curator bonis*. It is therefore ordered, that the cause be remitted back to the Court of Session in Scotland, with instructions to order that the report of the auditor be referred back to him, and that he do review the same, having regard to the above declaration; and it is further ordered, that the Court of Session, upon such report having been so reviewed and lodged, do proceed further in the said cause, and do make such alteration in the said interlocutor as shall be just and consistent with this declaration and judgment.

SPOTTISWOODE and ROBERTSON, Agents.

[1*st May*, 1849.]

HENRY INGLIS, W. S., Edinburgh, *Appellant.*

DAME EUPHEMIA H. BOSWALL, of Blackadder, and the Scottish Equitable Life Assurance Society, *Respondents.*

Servitude.—The benefit of a servitude in favor of one urban tenement over another, is not lost to the dominant tenement by the fact of the servitude having been omitted to be inserted in the titles of the servient tenement for a period exceeding forty years.

Ibid.—Terms of clause in a charter creating a servitude held not to create it for the personal benefit of the then present owners of another tenement, but for the perpetual benefit of the tenement into whosesoever possession it might come.

Ibid.—User, as a painter's shop, of buildings which had been erected in the back area of a dwelling-house, under a restriction not to build on the area any other buildings except stables, coach-houses, and other offices; held not to be such an adverse possession, though continued beyond forty years, as would work off the servitude and entitle the party to erect buildings beyond the limits allowed by the restriction.

IN the year 1780 Meason agreed to feu from the magistrates of Edinburgh a piece of building-ground on the north side of St. Andrew Square, upon which four dwelling-houses were subsequently erected, forming Nos. 26, 27, 28, and 29 of that Square.

Meason subfeued one stance to Sir John Pringle, who built a house for his own residence, which formed No. 27 of St. Andrew Square, and by progress came to be vested in the Respondents. Upon one of the remaining stances Meason built a house, forming No. 26 of St. Andrew Square, and in the area behind the house he erected a coach-house and stables entering

from a Meuse Lane, which ran along the northern boundary of the area. This house, No. 26, Meason retained for his own occupation. The remaining two stances he sold to Brough, and to enable him to make up a title he transferred to him his right under the agreement with the magistrates of Edinburgh, upon terms disclosed by the charter which Brough obtained immediately from that corporation, and to be now noticed.

Brough erected two houses, forming Nos. 28 and 29 of St. Andrew Square, upon the ground so acquired by him, and on the 16th March, 1781, he obtained from the magistrates of Edinburgh a charter which, after a recital containing these expressions,—"The said Gilbert Meason, esquire, having made "an agreement with John Brough, wright in Edinburgh, with "a view to preserve the lights of his own house, and of the "house built by Sir John Pringle, and disponed to the said "John Brough the remainder of the said lots, measuring in "front to St. Andrew's Square forty-five feet, in which dis- "position it is provided that the said John Brough, his heirs "or assignees, should not erect any houses or buildings upon "that part of the said lot so disponed to him, excepting the "said houses or buildings were agreeable to a plan subscribed "by the said Gilbert Meason, esquire, and him as relative to "the said disposition;" disponed the land to Brough, his heirs and assignees, "under the express burden, that the said John "Brough and his foresaids shall, in all time coming, maintain "and uphold, upon their own expenses, the arches of the said "cellarage, and communication with the common sewers, and "also the pavement covering the same; but always with and "under this restriction and servitude in favour of the said "Gilbert Meason, esquire, and Sir John Pringle, that the said "John Brough and his foresaids shall not make any alteration "upon the buildings already erected by him, so as to alter the "present outward appearance, but agreeably to the said dis- "position granted by the said Gilbert Meason, esquire, and "plan signed by him and the said John Brough relative

" thereto, that they shall erect no other buildings of any kind " upon any part of the said areas, excepting stables and coach- " houses, or other offices to be built in a line with the coach- " house and stable belonging to the said Gilbert Meason, " esquire, on the south side of the Meuse Lane, the ridges of " which stable, coach-houses, or other offices, are to be from " four to six feet lower than the ridge of the said Gilbert " Meason, esquire, his said coach-house and stable, and to con- " tinue the said coach-houses, stable, and offices, when built, at " the same height in all time coming."

In February 1782, Brough disponed one of the houses, which formed No. 29 of St. Andrew Square, to the Earl of Buchan, under a condition that the Earl, his heirs, &c., " shall " not erect any other buildings, of any kind, on any part of the " said background, except stables, coach-houses, and other " office-houses." In September 1782, the Earl of Buchan obtained a charter from the magistrates under the procuratory of Resignation in Brough's disposition, which contained the following clause:—" But always with and under this restriction " and servitude, in favour of Gilbert Meason, esquire, merchant " in Edinburgh, and Sir John Pringle, now James Veitch, " esquire, of Elliock, one of the senators of the College of " Justice, as coming in his place,—That the said David Steuart, " Earl of Buchan, and his foresaids, shall not make any " alterations upon the buildings already erected by the said " John Brough, and now belonging to him, so as to alter the " present outward appearance, but agreeable to a disposition " granted by the said Gilbert Meason, esquire, to the said John " Brough, and plan subscribed by them as relative thereto: " that they shall not erect any other buildings, of any kind, " upon any part of the said last-mentioned areas, excepting " stables and coach-houses, or other offices, to be built on a " line with the coach-house and stable belonging to the said " Gilbert Meason, on the south side of the Meuse Lane, the " ridges of which stables, coach-houses, or other offices, are to

" be from four to six feet lower than the ridge of the said " Gilbert Meason, his said coach-house and stable, and to " continue the said coach-houses, stables, and offices, at the " same height, in all time coming." The sasine expede by the Earl upon this charter, which was duly recorded, contained a repetition of the clause just quoted *in ipsissimis verbis.*

In 1787 the Earl of Buchan disponed the same house to Ramsay by deed, taking the disponee and his heirs, &c., bound not to " erect any other buildings, of any kind, on any part of " the said background, except stables, coach-houses, or other " offices;" and a charter expede by Ramsay contained a repetition of this clause.

In 1800 Ramsay disponed the house to trustees, " with and " under the burdens and restrictions contained in my own, " and my predecessors' charters and infeftments of the same." In 1808 Ramsay's trustees disponed to Bell, with a condition not " to erect any other buildings, of any kind, on any part of " the said background, except stables or other office houses;" and a charter expede by Bell contained the same condition.

Subsequently the house passed to Messrs. Law, and was purchased from them by the appellant. Under what conditions these two parties acquired title did not appear.

In the year 1789 Ramsay, the then proprietor, erected a coach-stable and other offices on the area behind the house No. 29. About the year 1808 this stable and offices were applied to the purposes of a painter's shop, and they continued to be so used thenceforth until the purchase of the house by the appellant. These buildings were nineteen feet three inches high, and thirty-six feet five inches deep, and the breadth of open area between their south wall and the north wall of the dwelling-house was sixty-four feet five inches.

In the month of May 1845, the appellant applied for leave to convert the painter's shop into chambers, to be used by him in his professional occupation as a writer to the signet, according

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to a plan which shewed that the existing height of the buildings would be continued, but that their breadth would be increased about eleven feet, thereby reducing the space between their south wall and the north wall of the dwelling-house to fifty-three feet five inches.

This application was opposed by the respondent, as proprietor of the house No. 27, upon the ground that the proposed alterations would be an infringement of the servitude in favour of the respondent's house, created by the charter obtained by Brough in 1781, which she insisted she was entitled to enforce.

The Dean of Guild granted warrant to make the alterations proposed by the appellant. The respondent carried the matter by advocation to the court of session, and the Lord Ordinary (Cunninghame) on the 17th February, 1846, pronounced the following interlocutor:—"Advocates the cause: Finds "that the new buildings proposed to be erected by the respon- "dent are contrary to the express terms of the servitude in the "titles of his predecessors, which the advocators have a legal "right and interest to enforce; and on that ground remits the "case to the Dean of Guild, with instructions to recal his "interlocutor, and to refuse the warrant as at present craved "by the petitioner: Finds the advocators entitled to expenses, "as the same may be taxed by the auditor, without prejudice "to the petitioner applying for such warrant to alter or recon- "struct the buildings on his back-ground as may be consistent "with the said servitude, and to the advocators their answer to "such application as accords, and decerns." And on the 10th March, 1847, the Inner House, upon a reclaiming note by the appellant, adhered to the Lord Ordinary's interlocutor.

Sir F. Kelly, *Mr. Rolt*, and *Mr. A. M'Neill* for the Appellant.

I. The object of the restriction was to preserve the line of the Meuse Lane, not by preventing the parties from encroaching

upon the lane, but by preventing them from retiring back from its line. The alteration which the appellant proposes was not in contemplation when the restriction was imposed, and therefore is not embraced by its terms. Indeed Meason had no interest, as the respondent has not, to prevent the alteration, for if allowed it will in no degree interfere with the prospect from the respondent's house, or impair its amenity. For this reason, if there be a doubt as to the construction of the clause, the benefit of that doubt should be given to the appellant.

II. The restriction is in its terms personal to Meason and Pringle—it is not given to them, their heirs and assigns, although these expressions are used in the dispositive clause. This use of the words in one part and dropping them in another shews an intentional change of expression, and the titles prove that the charter was so understood, for while they contain an assignment of the other obligations they do not contain any of this obligation in particular. The restriction therefore was intended merely as a personal benefit to Meason and Pringle so long as they should live.

[*Lord Chancellor.*—Do you say that the restriction would fall on the death of Meason and Pringle, though it was for the benefit of their houses and was for all time coming?]

Yes, and it might well be so. Parties might covenant for that and pay a less price than would have been asked had the restriction been perpetual. The burden was imposed upon Brough and his heirs in all time coming; but the benefit was not given for all time coming: if that had been intended, heirs and assignees would have been introduced.

III. If the restriction had been regularly inserted in the various transmissions it might have been binding, although it had been omitted from the infeftments, and thus had not entered the record; but when the conveyances and the infeftments for a period exceeding forty years did not disclose the servitude, a purchaser was entitled to consider that the title was as free as

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the deeds and the records shewed it to be. Were this otherwise no purchaser could be in safety that a restriction of this or any other kind might not be raised up against him, although it had been constituted more than a century before, but had dropped out of the titles. By positive prescription, therefore, the land was freed from the servitude. It must be admitted that a negative servitude cannot be lost by nonuser, but an alteration in the terms of the instruments of title after a certain date, as occurs in this case, may shew a title opposed to and destructive of such a servitude. But moreover, there was here adverse enjoyment sufficient of itself to do away the servitude, for while the restriction is to use the buildings as stables and other offices the enjoyment of them for upwards of forty years has been as a painter's shop.

Finally, the respondent is barred by her own acts from founding upon the servitude, for she or her authors have infringed the servitude imposed in their own title by erecting buildings in the back area, which come even nearer to the north wall of her house than the alterations proposed by the appellant will come to the north wall of his house. This, on the authority of Walker *v.* Renton, 3 Sh. 650, is sufficient to deprive her of any right to insist against others for the benefit of the servitude.

Mr. Bethel and *Mr. Gordon* for the Respondent—cited Greene *v.* Fergusson, Wilkie *v.* Scott, Cleland *v.* Mackenzie, Mearns *v.* Massie, 5 Dec. 1800, *Hume's Cases*, 736.

LORD CHANCELLOR.—Several points have been raised in support of the appeal in this case which have been very elaborately and very ably discussed, but upon consideration of the case there does not appear to me to be sufficient ground to maintain the appeal or to shew error in the decisions of the court below.

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The first point turns upon the construction of the charters. It is said that the right construction, assuming this party to be bound by the charters of 1781 and 1782, is that the charter of 1781 does not contain a reservation which operates to the benefit of any persons who take except Gilbert Meason and Sir John Pringle, those being the parties who were at that time the proprietors of the houses which were to be protected by the provisions of the charter.

Now it appears to me that that is contrary to the obvious meaning of the charter itself. It recites the title that Meason had obtained from the corporation of Edinburgh, and that Meason had made an agreement with Brough with a view (this was the object) to preserve the lights of his own house and that of Sir John Pringle, to whom part of the property had been agreed to be conveyed. That was the object of the charter. There can be no doubt that it was for the benefit of Meason and Sir John Pringle, as proprietors of those houses, the object being to preserve the lights of the houses, and the names of the parties were introduced only as descriptive of the premises intended to be protected by the reservation.

Then it provides that it should be "under the express "burden that the said John Brough and his foresaids shall in "all time coming maintain and uphold upon their own expense "the arches of the said cellarage and communication with the "common sewers, and also the pavement covering the same; "but always with and under this restriction and servitude in "favour of the said Gilbert Meason, Esquire, and Sir John "Pringle, that the said John Brough and his foresaids shall "not make any alteration upon the buildings already erected "by him."

Now the benefit of that is said to be confined to Meason and Pringle, the object being to preserve the lights of their houses, and the argument is that the lights were to be preserved only for the benefit of those individuals; and assuming

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that they had in any way ceased to take benefit by the house, there was no longer any restriction upon using the adjoining premises in a different manner from what was mentioned in the charter for the purpose of protecting the lights of those two houses.

It appears to me perfectly obvious that the houses were to be benefitted, and not the individuals. If that be so, of course that argument entirely fails. That is the opinion I should form from the language of the instrument itself. But we find that practically it is the construction that has been put upon it by the parties themselves, because we find that Sir John Pringle ceased to occupy the premises. Then we have Sir James Pringle, and by the charter of 1782 there is this reservation: "But always with and under this restriction and "servitude in favour of Gilbert Meason, Esquire, merchant "in Edinburgh, and Sir John Pringle, now James Veitch, "Esquire, of Elliock, one of the senators of the College of "Justice, as coming in his place," that is, coming in Sir John Pringle's place; and then, on the 5th of April in the year 1784, we find, "But always with and under this restriction and "servitude in favour of Gilbert Meason, Esquire, merchant "in Edinburgh, and Sir John Pringle, now James Veitch, "Esquire, of Elliock, one of the senators of the College of "Justice, as coming in his place." Therefore the construction and the contemporaneous construction put upon this instrument by the parties themselves appears to be entirely consistent with the obvious meaning of the language used in it. Consequently, upon that part of the case and the points that were made upon it, I have no doubt that the object of this provision was a restriction for the benefit of those two houses.

The next point is that the right so created for the benefit of these two houses has been lost, because it does not appear to have been repeated after the year 1784 in the subsequent instruments executed, not by the parties claiming the benefit of the right, but by parties deriving title from those who took

the land subject to the right, and who in dealing with that land have not referred to the terms of the original charter as to the reservation, and which were "that they should erect no "other buildings of any kind upon any part of the said areas, "excepting stables or coach-houses, or other offices to be built "upon a line with the coach-house and stable belonging to the "said Gilbert Meason;" the terms in the subsequent instruments being, "that they shall not erect any other buildings of "any kind on any part of the said back-ground except stables, "coach-houses, or other office-houses;" these terms containing the restriction as found in the charter, but not limited and restricted in the way they were by the first charter.

Now it is argued that the party who has disposed of property, reserving a certain servitude over it in favour of other property, will lose the servitude if the parties claiming the premises subject to the servitude, without his concurrence, without his presence, and contrary, of course, to his interest, should omit to put upon the register by which they have to make out their title all the reservation to the full extent to which it appeared in the original charter. If that is the law, it appears to me to be a very hard law, and very destructive of those rights which a party may think it convenient and proper to reserve to himself; because the individual not being a party to these transactions, knowing nothing of them, has no means of knowing the way in which the other parties may think proper to make out their title. He has done all he could to preserve his rights; he has registered the deed containing those rights. And those other parties having omitted to search the register now make this claim. If that be the law, all I can say is, one would expect to find some very distinct and decisive authority in favour of a proposition which takes away the rights of a party, not by any act of his own, but by the acts of another who has not taken all those steps which ought to have been taken for his own safety. But having

attended to what has been argued and the authorities which have been referred to, I must say that I have heard no authority to establish such a proposition as that which has been contended for.

It is very difficult to say what the party having the right could have done if he had searched and found that this deviation in the title had taken place. There is no doubt that he would be well entitled to contend that those rights could not be interfered with by others unless something had passed adverse with respect to himself about those rights. Now here that is not contended for, because in point of fact there has been nothing adverse. All that has been done is something inserted in the titles rather short of the restriction for his benefit. Is it to be supposed that because the right which he claimed has not been dealt with by the parties in a mode inconsistent with that right, because he has not had the opportunity of enforcing it (it not having been infringed to the extent which is now sought), that therefore he has no means of protecting it? But suppose the restriction had not been departed from, and the premises had remained as they were contracted to be by the original charter, can it be contended that a party loses his right merely because no opportunity has arisen for his exercising it? I am not aware that that is the law either in this or any other country, nor has any authority been produced to support such a proposition.

With regard to the remaining point as to the description of the locality, there was a sort of attempt made to support the argument upon the ground that this place called the Meuse Lane was not a public road, and might be part of the property included in the grant. That, however, it is quite obvious could not be, because it is described as one of the bounds of the property just as much as Saint Andrew's Square is. It is clear that the Meuse Lane is not part of the property included in the grant, which is bounded on the north side by

Queen Street, on the east side by Saint Andrew's Street, on the south side by the Meuse Lane, and on the west by property sold by Brough to Dr. Hunter. Well, then, the provision is "that they shall erect no other buildings of any kind upon any "part of the said areas excepting stables and coach-houses, or "other offices to be built in a line with the coach-house and "stable belonging to the said Gilbert Meason, Esquire, on the "south side of the Meuse Lane."

Now it is obvious from this that Meason had at that time built the coach-house and stables, because they are referred to as existing buildings, and they were on the south side of the Meuse Lane, and that formed no part of the property in the grant. It is said that the words "to be built in the same line "with the coach-house and stable belonging to Meason," meant on the same line towards the Meuse Lane. If that were so, it would be a very senseless and a very useless reservation. The party had the land up to the Meuse Lane; he had no more. If the party had brought the building somewhat back (a circumstance not very likely), how would that have benefitted any other party, or been an injury to any other party, provided there was no restriction as to occupying the whole of the area between the Meuse Lane and the backs of the houses? The object was to preserve the area between the back of the houses and the stables, and also to limit the height to which the stables were to be carried. Now that object is distinctly attained provided the buildings should be in a line with those at the back of Meason's house, because the clause referred to all the area between the house and the stables; and it was intended that that area should all be of equal extent, and that the stables should all be at the same distance from the houses. I therefore consider that "Meuse "Lane," as introduced here, was merely descriptive of the place where Meason's stables were erected, shewing that they were erected at the Meuse Lane. And then it is provided

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that any building erected shall be in the same line. That I conceive to be a construction that may reasonably be put upon the words "side of the lane," that is, the side which is towards the houses. That is exactly the line which is proposed to be evaded, and the objection is (whether it is more or less convenient I do not know) that what is proposed to be built would have the effect of extending the line of building nearer the house than the back of Meason's building.

Other points have been raised, which have been so far explained in the course of the discussion as to make it not necessary now to advert to them, particularly with regard to what Lady Boswall may have done at the back of her house.

Then comes another point which was relied upon by Mr. Rolt, and that is as to the use to which the premises at the back of the appellant's house have been applied. He says they have been applied not for the purpose of a coach-house, but for the purpose of a painter's shop. Now I find no restriction in the charter as to the use of these premises; nor was it the object of the charter so to provide. The object was to restrict buildings coming within a certain distance or approaching within certain limits of the backs of the houses. For that purpose the charter restricts the liberty both as to the building towards the house and as to the height. There is nothing else. And the buildings being kept within the limits prescribed by the charter, I see nothing to entitle the parties to say that the restriction has been departed from because these premises have been appropriated to other purposes than coach-houses. Indeed it would be very hard if they were not to be allowed to apply them to some other purpose. There are certain trades that are very noxious that parties are always prohibited from carrying on; and if that had been so here, possibly it might have been considered as a departure from the restriction in the charter, which was for the purpose of preserving the amenity of the houses. Then there being no

restriction in the charter that these premises are only to be used as coach-houses, it does not appear to me that anything that has taken place can possibly operate against the rights of the party who claims the benefit of this restriction in the charter.

For these reasons it appears to me that the Lord Ordinary's interlocutor pronounced below is correct, and ought to be affirmed.

LORD BROUGHAM.—My Lords, not having heard the whole of this argument as it has gone on, I shall decline giving any opinion, and shall only observe that as far as I have heard it I fully concur in the opinion which has been expressed by my noble and learned friend on the woolsack.

LORD CAMPBELL.—My Lords, I have heard the whole of the arguments in this case, and I concur entirely in the view which has been taken by the noble and learned Lord on the woolsack, and I do not think it is necessary to add anything to what he has said.

It is ordered and adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

LAW, HOLMES, ANTON, and TURNBULL—DUNLOP and HOPE, Agents.

[*3rd May*, 1849.]

JOHN MURRAY, Esq., Advocate, and Others, *Appellants.*

ROBERT GRAHAM, Esq., of Balgowan and Lynedoch, *Respondent.*

Entail.—Form of prohibitory and irritant clause under which the irritancy was held to fence only the latter part of the prohibitory clause.

THE Respondent was heir in possession of the lands of Balgowan and Lynedoch, under an entail executed by Thomas Græme in the year 1726, which contained the following prohibitory irritant and resolutive clauses: "And in like manner "it is hereby Expressly provided and Declared And be it so "Provided and Declared by the Resignation and infeftments to "follow hereupon That it shall not be lawfull to the said John "and Thomas Græmes my Son and Grandson nor to any of "the persons succeeding in the trust-right nor to the said "heirs of tailzie in fee to Dispone alienat Wadsett or burden "the said lands and others above written or any part of the "same, Nor to Contract debts Commit Treason, or to alter "Innovat or infringe the Course of Succession before specifyed "by any fact or deed civill or criminall Ommission or Com-"mission whereby the said lands and estate may be adjudged "forfeited evicted or any ways Lessened or impaired Declare-"ing all such facts and deeds Ommissions and Commissions to "to be void and null And moreover It is hereby Expressly "Provided Conditioned and Ordained That if the said John "and Thomas Græmes my son and grandson or any of the "persons succeeding in y^e^ trust-right or any of the heirs of "tailzie in fie shall alter infringe or innovat the order and

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" Course of Succession prescribed and appointed by the pre-
" sent tailzie or Contraveen and violat any of y^e^ provisions
" and Conditions before mentioned, The Contraveener Shall
" *ipso facto* lose tyne and amitt all tittle and right to the Lands
" & others above specifyed with all benifite and advantage that
" he or they might claim by vertue of thir presents and the
" Course of Succession before mentioned, And the same shall
" fall appertain and accresce to the next member or heir of
" tailzie, whether descending of the Contraveener's body or
" not, to whom it shall be leisume and free to establish his
" or her right and tittle and to enter to y^e^ possession of the
" lands and others above rehearsed by Service adjudication or
" Declarator or any other manner of way agreeable to the laws
" of the kingdome."

The Respondent, by contract of sale on the 9th and 11th days of January, 1845, sold the lands of Lynedoch to Simpson, for 135,000*l.*, and of Balgowan to Thomson, for 42,000*l.* These parties, with the view of ascertaining whether the Respondent could give them a good title, respectively brought a suspension as of a threatened charge for the price of their purchases. The Respondent, in consequence, brought an action against the substitute heirs of entail, setting forth in the summons his title to the lands under the entail, and concluding for a declaration of his rights in the following terms: "That the Pursuer has
" full and undoubted right and power to sell the several lands
" and other heritages before mentioned, to which he has suc-
" ceeded and has now right, as aforesaid, and also to alienate
" and dispone the said land and others, and to grant, execute,
" and deliver all dispositions, conveyances, deeds, procuratories
" of resignation, precepts of sasine, and other writings what-
" soever, which may be requisite and necessary for effectually
" conveying to the purchasers, and their heirs or assignees, the
" lands and others sold to them as aforesaid; or at least that
" the contracts of sale of the said lands and others entered into

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" by the Pursuer, are valid and effectual to the purchasers " thereof, and they are entitled to adjudge the said lands and " others in implement of the said contracts of sale; and speci- " ally, without prejudice to the said generality, that the Pursuer " has full and undoubted right and power to sell the foresaid " lands and others to the said James Simpson and William " Thomson respectively, in terms of the contracts of sale " entered into with them respectively as aforesaid, and under " the exceptions and reservations therein specified; and also to " alienate and dispone the said lands and others to them " respectively; and to implement and fulfil the whole obliga- " tions incumbent on him by the said contracts of sale in " favour of the said James Simpson and William Thomson " respectively; or, at least, that the said James Simpson and " William Thomson are entitled to adjudge the said lands and " others respectively sold to them, in implement of the said " contracts of sale; and that the Pursuer, and his heirs, execu- " tors, or assignees (excluding his heirs of taillie and provision), " have the sole and the exclusive right to the prices of the said " lands and others, and have power to grant valid and sufficient " discharges for the same, and that the Pursuer and his fore- " saids do not lie under any obligation to invest, employ, or lay " out the said prices, or any part thereof, in the purchase, or on " the security, of any other lands or heritages, or otherwise, for " the benefit of the defenders, or any of them; but that the " Pursuer and his foresaids, excluding as aforesaid, have full " power to use and dispose of the said prices as their absolute " property at pleasure; and that the said defenders have no " right or title to interfere with or control the Pursuer in the " use and disposal of the said prices, or any part thereof, in any " manner of way; and also, that no claim or demand of any " description is competent to the said defenders, or any of " them, against the Pursuer, or his heirs or representatives, for " or in respect of his selling, alienating, or disponing the said

" lands and others, or granting dispositions of the same, or on " account of the foresaid contracts of sale, or either of them, or " any adjudication or other proceeding that may follow there- " upon, or otherwise, or for or in respect of the pursuer or his " foresaids using and disposing of the whole prices of the said " lands and others at pleasure."

The two suspensions and the action of declarator were conjoined, and the Appellants and Respondents having argued the question raised, in cases to the Lord Ordinary (Simpson and Thomson, being willing purchasers, took no part, except to watch the proceedings), his Lordship, on the 12th June, 1846, pronounced the following interlocutor, to which he added the subjoined note: "The Lord Ordinary, having considered the " revised cases for the parties, in the conjoined processes of " suspension and declarator, and whole proceedings, Finds that " the irritant clause in the entails of Balgowan and Lynedoch " is confined and restricted in its application to the prohibitions " against contracting debt, committing treason, and altering, " innovating, or infringing the course of succession specified in " the said entails, and does not apply to the prohibition against " disponing or alienating the entailed lands, or strike at deeds " of alienation or sale thereof; and therefore, in the declarator, " finds, ordains, and decerns in terms of the conclusions there- " of; and in the suspensions, repels the reason of suspension, " and decerns, and finds no expenses due."

The Appellants reclaimed, and the Court (1st division) ordered additional cases to be prepared and laid before the Judges of the other division and the permanent Lords Ordinary, for their opinion. These cases were accordingly prepared and laid before the Judges, who, by a majority of seven to two, concurred, in the result, in holding that the interlocutor of the Lord Ordinary should be adhered to, although several of them differed from the others in the way by which they arrived at this conclusion.

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In conformity with the opinions of the consulted Judges, the Court, although equally divided in opinion, pronounced the following interlocutor on the 21st of January, 1848:—"The "Lords, having resumed consideration of the Reclaiming "Notes, Nos. 26 and 27 of process, and whole proceedings, "and having taken into consideration the Additional Revised "Cases, together with the Opinions of the Consulted Judges, "In respect of the opinions of the majority of the Judges of "the whole Court,—Refuse the prayer of the said Reclaiming "Notes, and adhere to the interlocutor of the Lord Ordinary "reclaimed against."

An appeal against the interlocutor of the Lord Ordinary and this interlocutor of the Court was taken by the Appellants, and also *pro forma*, by the purchasers.

Sir F. Kelly and *Mr. Bethel* (with whom was *Mr. Anderson*) were heard for the Appellants, to argue upon the constructon of the fettering clauses in the entail, and in the course of their argument relied upon a variety of previous decisions upon entails; but, inasmuch as this case will be a precedent only where clauses in precisely the same terms shall occur, and will be of little value in any other case; it is unnecessary to give the arguments of counsel or the authorities cited by them.

The Lord Advocate and *Mr. Rolt* were heard for the Repondents; and

Mr. Wortley appeared for the purchasers, but was not called on.

LORD CHANCELLOR.—My Lords, we are informed that these proceedings affect an estate of great magnitude. The case is therefore of great importance to the parties. The question raised received the most minute attention from the Court below, as it has done in this House. It has been very ably and deliberately argued here. And from what we see of the opinions of the learned Judges in the Court below, the conclusion that

they came to could not have been arrived at without very deliberate consideration. But after going through the whole case, and giving it my best attention, and after examining the opinions of the Judges in the Court below, and attending to the arguments at the bar, I do not think it necessary to take further time for its consideration.

My Lords, some cases have been referred to by the counsel for the Appellant; but it is very well known that in the construction of deeds of entail cases upon other deeds of entail are of no authority, unless identically the same words are found in the same clauses. That rule is so well ascertained and so well understood by your Lordships, as to make any authority unnecessary to assist your judgment.

The statute has laid down certain rules by which a party creating an entail must abide before he can have the benefit of the provisions of the Act. He must prohibit the acts that he means to prevent, and he must void those acts; and he must also declare that the commission of those acts shall be a forfeiture. Now there is no doubt that in the present case the party making the deed prohibited alienation. Nobody disputes that. But then the question is, whether he has included the acts of alienation in the irritant clause. That is the whole question upon which the matter depends. Now the language in the irritant clause of the deed is this: "declaring all such facts "and deeds omissions and commissions to be void and null." And what are those "facts and deeds" which any future heir is declared to be incapable of? When we look to the immediately preceding clause we find that the language is, "Nor to contract "debts, commit treason, or to alter, innovate, or infringe the "course of succession before specified by any fact or deed, civil "or criminal, omission or commission, whereby the said lands and "estate may be adjudged, forfeited, evicted, or anyways lessened "or impaired;" and he declares that all such facts and deeds shall be null and void. Applying the ordinary course of construction

to this, can anybody doubt that, when he declared such facts and deeds to be null and void, he meant those facts and deeds of omission and commission which are to be found in the immediately preceding sentence? Upon that matter there does not seem to have been any manner of doubt in the Court below, nor in the mind of the learned person who prepared these papers; for the first reason given in the appeal is, "Because the deeds "of entail of Balgowan and Lynedoch contain sufficient prohi- "bitions against selling the estates; and these prohibitions are "duly fenced with proper irritant and resolutive clauses" assuming that the irritant clause does refer to the facts and deeds of omission and commission, the prohibition of which is to be found in the sentence immediately preceding; and they endeavour to get out of the difficulty they are in by showing that in the preceding sentence there is a description of all the different prohibitions. Now, my Lords, on considering these words over and over again, it appears to me to be perfectly plain that, according to the ordinary use of the terms, they do not apply to alienation. The irritancy might be presumed; but in all cases of this sort we cannot presume it. The intention must be expressed. It must be declared in the express terms of words. You cannot look at the intention *aliunde* and apply to it words to carry out that intention. He says, "he shall not do any act "or deed whereby the lands may be evicted, lessened, or im- "paired." They say that the whole object of that was to prohibit alienation, but it is not possible to attach such a meaning to the words. I think that a sufficient answer has been given to that argument, and that these latter words cannot be applied to the prohibition against alienation.

My Lords, the words "or" and "nor" have been referred to; but this was a matter on which I think the parties did not rely with any great confidence. But it is quite clear to me that it was not the intention to use the word "nor" as here placed in precisely the same sense as the word "or" before; for what

does he do? He declares that "it shall not be lawful to dis-"pone, alienate, wadset, or burden the said lands." He says, "or burden the said lands." There you have the word "or" used; and having described matters which he wished to prohibit, and which he considered *ejusdem generis*, he comes to a new prohibition, not going on in the same sentence, "Nor to con-"tract debt." There he takes up the word "nor." The word "nor" is a renewal of the prohibition: "He shall not do these "things, nor shall he do so and so." It is obvious something is to be inferred from changing the word "or," which is used immediately before, into the word "nor;" but the real ground upon which I dispose of this case is not upon the use of the words "or" and "nor," but upon the true sense and intention to be inferred from the whole prohibition, and that these latter words "facts or deeds" apply to the last antecedent; viz., altering the course of succession by any fact or deed. It appears to me that, although there is a distinct prohibition against alienation, the words in the irritant clause "facts and deeds, omissions and "commissions," although they are the same words as are found in the prohibitory clause, do not apply to alienation; and consequently the judgment of the Court below appears to me to be correct.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view he takes of this case, nor have I entertained any doubt from the beginning, or from the moment when I became master of the argument and the words in the deed of entail upon which that argument was raised; and I was induced by my noble and learned friend near me to agree to hear the Respondent's counsel, after the Appellant's counsel had exhausted all their ingenuity and learning in persuading us to differ from the Court below—not from entertaining any doubt that the Appellant's counsel had failed in their contention, but because there was a difference of opinion

among the Judges in the Court below, which required that this Court, with due respect for the dissentient Judges in that Court, should hear all that could be said on both sides, and also because it was a case of very considerable importance in point of value, upon the decision now to be given depending a title in the hands of the proposed purchaser—not an unwilling purchaser—to an estate of the value of 200,000*l.*

My Lords, this ought to make your Lordships, in dealing with such a question, anxious to be quite clear in your own view as to the conclusion at which you are minded to arrive. At the same time, if the case is encumbered with no difficulty—if there is nothing in the way of authority, either of text-writers, or of decided cases, to shake the judgment given in the Court below—if indeed the principles laid down by all the authorities, both of text-writers and of decided cases, are agreed upon, as it appears to me substantially they are on both sides of the bar here, and by all the Judges below, however they may have differed in their opinion upon the application of the principles to this case, then the olny question that can arise here is in respect to the application of those principles—universally admitted principles—to this particular case.

Now no man doubts that the question of the validity of an entail depends not only upon the intention of the party making the entail, but upon something beyond that. In one sense it depends upon that intention; that is, unless you can gather from the words which he uses in his instrument, that he intended to fetter succeeding heirs, of course there is no proper entail. On one side, therefore, the intention of the party making the entail is a test, but on the other side it is no test at all; it is an example of what logicians call a unilateral test; for you may discover the intention of the party making the entail ever so much, by the words which are used, and yet the entail shall be invalid, unless those words are such that you cannot give them any other construction; and therefore you must needs hold not

only that the intention existed in the mind of the party using those words, but that he used such words as the law will allow to carry out that intention. That is the rule in cases of entail. Consequently it is totally different from a question as to the words of a contract, or as to the words of a will which are not governed by the principles of the law of entail of real property, because in those cases you gather the intention of the party making the instrument, be it a contract or be it a will, in whatever way you can; and accordingly, both in Scotland and in England, in such cases, in order to get at the general intention of the party, you look to words not only within the particular clause whereupon the difficulty in the construction arises, but you look to other clauses in the instrument for the purpose of learning what the party making it really meant. You gather his intention from those other clauses taken together with the clause upon which the difficulty arises, that clause itself not being explicit and clear; and then, provided he has intended that which the law allows him to intend and to do, you give effect to the intention by your decision. But that is not so in the law of entail; you are not to gather what the intention of the maker of the deed is, from looking at all the instrument, and to say, I have no doubt Mr. so and so meant to entail his estate, and to fetter succeeding heirs. The question is, whether he has validly done that, just as in the English law no man ever meant to make a void entail; no man ever intended, when he professed to entail his estate, to leave a loop-hole through which the party who was meant to be fettered might creep, and get free from those fetters; and no man in this world ever intended to make a void executory devise so as to let in the party he intended to keep out. No man in his senses ever intended that. Yet we all know that a party must do what he intends to do in a certain way, and within certain rules; otherwise his intention goes for nothing; because what he has done is not what the law allowed to be done at all; and as by law it is not allowed

to be done, except in a particular manner, and unless he has conformed to the requisitions of the law, and done it in that manner, though you may be perfectly convinced that he intended to entail his lands, he has not in fact entailed them, and you will not give validity and force to what he has so done. That I believe is the clear rule of law, which is universally admitted. Another rule may be added which is equally admitted on all hands; viz., that there is no general form of words which a man must use by law, in order to make his entail valid. It is not necessary that he should use this or that particular form; but he must use such words as show first of all, that he has prohibited alienation, if the question arises as it does here upon the alienation; secondly, that he has made the prohibition of alienation effectual, by making irritant or void all acts of alienation; and thirdly, that he has resolved the right of the contravener by inflicting a forfeiture upon the person that alienates. All those things must be done in order to make a valid entail; and the question is whether those three things are done here? It is quite clear that the first is done; it is quite clear he has prohibited alienation, and in the most specific and technical terms; but this is (as Lord Moncrieff observes) in other respects a very blundered instrument; and he has not, in my opinion, declared void the alienation. If he had said, "It shall not be lawful for "any of my heirs of tailzie to dispone, alienate, wadsett, or "burden the said lands and others above written, by any fact or "deed," and then he had declared such fact or deed void, that would have been quite sufficient, because alienating might then have been taken to be a "fact or deed" which is declared to be void. But he has not said so. He has gone on to say, after saying that he shall not alienate, "nor to contract debts, commit treason," and therefore read it thus; for if he had used those words a second time, he would have so said, "Nor shall it be "lawful to contract debts, commit treason, or to alter, innovate, "or infringe the course of succession before specified, by any

"fact or deed;" (there for the first time using those words), "civil or criminal, omission or commission, whereby the said "lands and estate may be adjudged, forfeited, evicted, or any "ways lessened or impaired, declaring all such facts and deeds, "omissions and commissions, to be void and null." Can any one, reading those words, doubt that they are applicable to the last antecedent—"the facts or deeds" then mentioned, for the first time mentioned? "Civil or criminal omission or com-"mission" immediately preceding the declaration of nullity in the irritant clause are, "such facts and deeds." (Here the words "civil and criminal" are unnecessary to be repeated, because if you say such "facts and deeds," those facts and deeds are supposed to include civil or criminal; the words, therefore, in the clause must be taken to mean such "facts or deeds, civil or "criminal.") Then to make it quite clear, if it were not already clear enough, it says, "omission or commission," which are the other words in the clause referred to following after the words "facts or deeds, civil or criminal." What Lord Moncrieff says is perfectly true, that if those words are to be taken as the counsel on the part of the Appellant contend that they ought to be taken, viz., to ride over the whole of the prohibition, and to apply to alienation without those words, "whereby the lands and "estate may be adjudged, forfeited, and evicted," and so forth, no man can doubt that, in point of law, that would be a general and absolute prohibition of alienation, stopping short of those words; and it is quite clear that it was intended by the makers of the deed to be a strict prohibition of alienation. But by including those words, and making them ride over all that goes before, says Lord Moncrieff, you limit the prohibition.

My Lords, I therefore think, without going further into the cases which have been cited to us, that this judgment must stand. I may add, with respect to those cases that have been cited, that it appears to me, Lang v. Lang has no material application to the case. It does not decide it either way. This case

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stands perfectly clear of it. And as for that of Murray of Cockspow, it has no application to the case, and no argument can be founded upon it either way. The decision in this case unsettles no former case; it breaks in upon no former decision; this case stands precisely as every such case must stand, upon its own broad principles. This instrument is, as Lord Moncrieff says, a very ill-conceived and blundered instrument. It is clear that the intention of the party was to tie up the lands; but it is equally clear that he has failed to do so. And after having heard a most able argument at the bar, we are of opinion that the Court below came to a right decision.

LORD CAMPBELL.—My Lords, upon full consideration I entirely adhere to the rule that I ventured to propose to your Lordships in the cases which have been referred to, that notwithstanding entails are odious or *strictissimi juris*, when you come to construe the irritant or resolutive clauses in these deeds, you will give to the language employed in them its natural and grammatical meaning; and if upon that principle the words are such as not to carry out the purpose of the entail, you must so decide. If, on the other hand, when you come to construe the language employed in the deeds, a valid entail is made, you must uphold the entail. Now, when these principles are applied to this case, I can find nothing in the natural and grammatical meaning of the words employed, that can be construed into a prohibition of alienation. For the reasons that have been so forcibly stated by my noble and learned friends who have preceded me, I am clearly of opinion that the irritant clause cannot be applied to alienation; and, therefore, the entail being without an irritant clause, it is void. As to the cases which have been cited, none of them throw the slightest doubt upon the decision in this case, but they are all consistent with the judgment now pronounced.

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It is Ordered and Adjudged by, &c., That the said petition and appeal be, and is hereby, dismissed this House; and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellants do pay, or cause to be paid, to the said Respondent, the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: And it is also further Ordered, That unless the costs certified, as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON—RICHARDSON, CONNELL, and LOCH.

[*7th May*, 1849.]

CAPT. JAMES ERSKINE WEMYSS, of Wemyss, *Appellant.*

JOHN DRYSDALE and Others, *Respondents.*

Landlord and Tenant.—Lease.—Under an obligation by a tenant not to remove fodder, &c., produced on the lands held by him (hay, &c., "of the *last crop* excepted"), and a renunciation of the tenant's lease, accepted by the landlord fourteen years before its expiration by effluxion of time, the crop of the year in which the renunciation was accepted is to be treated as the "last crop," in construing the restriction upon the tenant as to the removal of fodder, &c.

IN the year 1841 the Appellant granted Pringle a lease of lands for nineteen years from Martinmas 1839, and in the lease took from him an obligation in these terms: "And the said Hall "Pringle binds and obliges himself and his foresaids not to "remove or dispose of any fodder, straw, or turnips which are "produced on the lands hereby let (hay and fodder of the last "crop excepted), and to lay the whole dung thereby produced "upon the said lands; and he also obliges himself and his "foresaids to leave to the proprietor or incoming tenant at a "valuation, all the dung which may be made on the farm after "the sowing of the last crop: And it is farther provided and "declared that the outgoing tenant shall, at the expiry hereof, "if the landlord or incoming tenant desire it, leave twenty-one "acres of land in summer fallow four times ploughed, and "sufficiently harrowed and cleaned, for which he shall be "allowed such a deduction out of his last year's rent as may be "ascertained by two neutral men to be mutually chosen, or by "an oversman to be named by them in case of their differing "in opinion: And farther, it is provided that the outgoing

" tenant shall allow the landlord or incoming tenant to sow " grass seeds along with the last crop on all or any part of the " lands hereby let which shall have been in summer fallow or " green crop the preceding year; and the outgoing tenant shall " be bound to harrow and roll in such grass seeds, and shall not " pasture the lands thus sown after the separation of the crop " with which it is sown, for which he is to be allowed by the " landlord or incoming tenant the sum of 2*s.* 6*d.* for each acre " sown with grass seeds."

Pringle fell into difficulties, and on 26th April, 1844, executed a renunciation, which was accepted by the Appellant, and contained the following, among other expressions: " I have " renounced and overgiven, as I hereby renounce, *simpliciter* " upgive and overgive, to and in favour of the said James " Wemyss Erskine, Esq., his heirs and successors, the said " tack and my possession of the several lands and others " foresaid, in virtue thereof, and all claim, interest, or advantage " I could have, or pretend therein, with the whole clauses and " obligements therein contained in my favour, and all that has " followed, or may be competent to follow thereupon for ever."

In the month of August 1844, the Appellant presented an application to the sheriff, praying him to interdict the Respondents, who were creditors of Pringle, " from selling the straw " off the farm, or otherwise proceeding with the sale of the " growing corn," which they were about to do under letters of poinding.

The sheriff granted the interdict, and the case was then carried by the Respondents to the Court of Session by advocation. The Lord Ordinary (*Wood*), on 13th June, 1846, found that Pringle was entitled to remove and deal with as his own property, the straw and fodder of crop 1844, and that the Respondents, his poinding creditors, had right to sell and dispose of the same, and recalled the interdict against them.

The Appellant reclaimed, and the Inner House being

equally divided in opinion, directed the opinions of all the other Judges to be taken. These opinions, by a majority of 5 to 4, were for adhering to the Lord Ordinary's interlocutor, and this was accordingly done by an interlocutor of 27th June, 1848.

Sir F. Kelly and *Mr. Anderson*, for the Appellant, cited Whittaker *v.* Barker, 1 *Cro. & Mees.* 113; Roxburgh *v.* Robertson, 2 *Bli.* 156; Gordon *v.* Robertson, 2 *Wil. & Sh.* 115; in order to show what are the rights of a tenant in regard to the fodder produced upon his lands.

Mr. Bethel and *Mr. Wortley*, for the Respondents, relied upon the terms of the particular clause in Pringle's lease.

LORD CHANCELLOR.—My Lords, it has been represented at the bar, that the property respecting which the present litigation has arisen is worth 300*l.*, but it turns out not to be worth anything like 300*l.* The straw and fodder, out of which the contest arose, may be worth that money; but the contest is, what is the right and interest of the landlord and tenant as to the mode in which the produce, which is represented by that 300*l.*, is to be used? It is very unfortunate to find a matter of such small value the subject of such expensive litigation; and it is very much to be regretted, that the matter having come into litigation, there should have been so much difference of opinion among the learned Judges in the Court below, as to have made it indispensable for the parties to come here, not being satisfied with the judgment of the Court below.

My Lords, having considered the opinion of those learned Judges, and having heard the mode in which the case has been argued at the bar, I really cannot myself feel the great difficulty which seems to have been felt in the Court below. It appears to me to be very clear that the interlocutor ultimately pro-

nounced, though by a small majority, does that which the interests and rights of the parties required.

The proceeding originated in an application for an interdict by the landlord, seeking to restrain the tenant from removing from the premises the straw and crop of the year preceding the time when he actually quitted by contract between himself and his landlord. It seems, however, that after that interdict had been discussed, by arrangement, the whole crop, including the straw as well as the corn itself, was sold; and that the matter in dispute now exists in the shape of money, and not of material.

Now, my Lords, two questions appear to me to arise, and those two questions may be determined in a very few words. The landlord (as is usual) restricted his tenant as to the mode in which he should manage the farm; and, amongst other provisions, he bound him "not to remove or dispose of any "fodder, straw, or turnips which are produced on the lands "hereby let (hay and fodder of the last crop excepted), and to "lay the whole dung thereby produced upon the said lands, "and the tenant also obliges himself to leave to the proprietor "or incoming tenant, at a valuation, all the dung which may be "made on the farm after the sowing of the last crop." It was also provided that the outgoing tenant should at the expiry of the lease, if the landlord or incoming tenant desire it, leave a certain number of acres in summer fallow. And then it is provided "that the outgoing tenant shall allow the landlord or "incoming tenant to sow grass seeds along with the last crop "on all or any part of the lands."

The provision amounts to this, that you shall not remove fodder, straw, or turnips grown on the land, hay and fodder of the last year excepted. That, however, is not the whole provision, for it goes on, "And to lay the dung thereby produced "upon the said lands;" obviously showing (as one might expect) that the object of the landlord was to procure a certain

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quantity of manure and maintenance for the land, by providing that the produce of the land should be expended on the land, but for very obvious reasons excepting hay and fodder of the last crop, inasmuch as to impose any restrictions as to that would be an interference with the rights of the tenant, who would otherwise be entitled to remove and sell all that the land might produce. And therefore so long as the tenant might have an interest in the land, and therefore an interest in the improvement of the land by the application of fodder, it was provided that he should lay it out on the land; but when that interest ceased, it would have been inflicting a penalty upon him to have compelled him to leave on the land that from the employment of which he would derive no benefit, namely, the fodder and hay and straw of the last crop.

The first question that arises is, What is the meaning of the "last crop?"

The term no doubt is for nineteen years, and in speaking of the term the word "years" we find is used; but why have the parties departed from that, and used the word "crop" in this as well as in the second sentence, where the provision is introduced, entitling the landlord to enter, notwithstanding the non-expiration of the term, and to sow grass seeds upon the tenant's land? Obviously that the landlord might have the benefit of the seed so sown. There also we have the word "crop."

Now it is impossible to say that the straw and fodder in question is not the last crop, for beyond all question it is so. If the word had been the "last year," then there might have been a question whether, although the words "last year" were used, those words did not mean the last year of the tenancy, although by another construction it would be the last year of the nineteen years. But here we have the expression "the last "crop." Those, therefore, who contend that the tenant is not entitled to remove this property must show some ground, to be

found in the instrument itself, for construing the word "crop" the same way as if it had been not only "year," but the last year of the nineteen years. The word "crop" coming by itself, if not affected by any other provision, carries the general crop. Here the contest is respecting the hay and straw of the last year of the tenancy, that is to say the last crop. The last crop the the tenant is to remove from the land. If therefore that be the right construction, there is no ground upon which the case can stand; because then, according to the terms of the original lease, this being the "last crop," he would be entitled to remove it, that is to say, the covenant which prohibits him from exercising the ordinary rights of property over the produce of the whole of the land cultivated by him would not apply, because there is an exception of the last crop.

Now suppose instead of the words "last crop," the word "year" had been used, and the word "year" were to be considered not as the last year of the tenancy, but as the last year of the nineteen. Then what has happened is, that for reasons sufficiently good, no doubt, an agreement has taken place between the landlord and the tenant. The tenant it appears was not able to go on with the cultivation of the farm, and the landlord, for very good reasons (having ascertained this fact), was very glad that he should quit the farm, and the tenant was very glad to get rid of the encumbrance of a farm which was beyond his power to manage. Therefore the renunciation took place; and by the renunciation it was agreed that the tenant should quit at Martinmas. There is nothing in the renunciation about this particular provision; the only part which affects it is, that he upgives and overgives to and in favour of the landlord the whole of the clauses and obligements contained in the deed in his favour, and that should follow or might be competent to follow thereupon for ever; and he binds himself to flit and remove his servants, cottars, and dependants on or before the term of Martinmas next.

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The result, therefore, is, that instead of the tenancy being to be continued for nineteen years from the date of the lease, it is to be at an end at Martinmas 1844. There is no special provision; and those words, that he renounces all clauses in his favour, could hardly be made to apply to the present case. In one part, however, of the argument which has been urged on the part of the landlord, it has been contended that this is an obligation in his favour. But it is not an obligation in his favour; it is an exception from the obligation in favour of the landlord, because the covenant is a restriction of the common right which the tenant would have of dealing with his own property. It is not an obligation, therefore, by which the tenant undertook anything, but one by which the landlord limits the right of the tenant by contracting with him.

Then it does in fact come merely to this: that the renunciation alters the period at which the tenancy was to determine. The term is determined by contract between the parties at Martinmas 1844, instead of running for the whole period of nineteen years. For the present purpose I am considering the words "last year," as meaning the last year of the nineteen. Does not that of necessity make every provision limiting the the term, speak as of Martinmas 1844 as it would speak of the end of the nineteen years, as if nothing had happened between the parties to determine it. It is still the "last crop." We know very well that if a tenant holds under a lease and holds over, the lease being expired, the lease contains the contract between the parties. It is gone as to time, but it remains obligatory as to the special provision; and the parties making no other contract, it is assumed that that which was the contract for one period continues, as between them, to be the contract for the protracted period; and the landlord permitting the tenant to occupy and the tenant occupying, although the lease has expired, the provisions of the lease are binding on both.

Then, as some of the learned Judges put it, if the contract

had been that it should extend to the period that is held over by the tenant, that is precisely the same thing. In the case put there would be an express contract. But here instead of holding over, they come to an earlier determination; but a different rule is not applicable to the one case from that which is applicable to the other. All that the parties have done has been to alter the term, but not to alter the contract.

Then observe the extreme absurdity of the consequence which would follow from the opposite construction. What is to become of the property? It is said at the bar, that the parties can ascertain their interests, and that they may agree among themselves. That is not the way in which the courts of law are to administer the rights of parties. If the parties do not agree among themselves, I should like to be informed what mode there is of coming to any decision as to their rights. The interdict, I suppose, would stand, and we are considering the case as it stands, upon the contract between the parties with the interdict operating upon that contract. The tenant cannot remove this 300*l.* worth of straw. The landlord, of course, is entitled to possession; his new tenant will hold possession under him. But it was said at some period of the discussion below, that the landlord has no property in this hay and straw. It is quite clear he has no property in it, because he has only a right to insist on the tenant using it in a certain way. The incoming tenant has no property in it, the outgoing tenant is turned out of his farm, and he has a property in it; and the only person who has property is prohibited from making use of the property, because he cannot come upon the land after quitting it to do anything with the property. The interdict prevented his removing it, and therefore, although it is the property of the tenant, he is prohibited from doing anything with it, with the object of converting it to the usual purposes of property. It seems to me to be confined entirely to a question of property, and the result of the interdict would be to prevent the tenant

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removing the property without giving any one a right to do anything with it.

But now, what is the nature of the interdict which the landlord and tenant have, supposing the lease to continue, and the year 1844 to be the last of the nineteen? The produce is to be laid out (for that is the obvious meaning of the provision) in the shape of manure. Then the tenant, of course, if he continued to hold, would have the whole benefit of his own property, and of the mode in which he had used that property; but the landlord does not choose that the tenant should exercise that discretion, however beneficial to himself, and he says, "I, "too, have an interest in having the land kept in a proper state, "and I therefore insist that that which is your own property "shall be used in such a mode as to enure to the benefit of the "farms you are about to occupy under me." That is a very usual, natural, and proper provision. But when you come to the end of the term, whenever that may arrive, it is quite clear that the landlord derives a benefit, but the tenant loses it, if the covenant enures that he should lay out this produce in the shape of manure. That must be limited. It is not contended that it is to continue. The covenant for *leaving* continues, it is said, but the covenant for *using* is necessarily assumed not to be in operation. But it is all one provision. Why is he not to remove it during his occupation? Because he is to use it as manure. Why is he to be permitted to remove it in the last year? Because compelling him to leave it on the land for manure would be taking from him that which is his property.

A case has been referred to in which there was a provision that the tenant should leave all produce of this kind at the end of the term. To be sure, a man may so contract if he please; he may contract that he shall leave any other part of his property on a farm. The whole that that decision comes to is this, that having so contracted, he cannot go from it. But here the contract is just the reverse, for he has contracted that he shall

not be compelled to leave the last year's produce on the farm. That case, therefore, can have no application to the present.

The case of Whittaker *v.* Barker, which was decided in the Court of Exchequer, has been referred to, and I have looked to that case for the purpose of seeing whether it touches at all on the present. There were, in that case, three claims. The tenant was to pay 95*l.* for coming in, which he never paid, and there was another claim for some buildings, which were not applicable to the farm which he occupied, and which, therefore, did not arise, but he was paid those when he quitted the farm. Now it is quite immaterial whether your Lordships should think that decision was right according to the facts as they were proved. The only important part of that case is, whether the principle laid down by the Court is applicable to the present case, and whether it can have any effect upon the decision which your Lordships ought to pronounce. Mr. Baron Bayley says, "it "seems to us that he is not entitled under the circumstances "under which he quitted. He quits without his landlord being "apprised by any bargain, that he is about to quit; and we think "that such a quitting is not a quitting under the terms of the "tenancy. It was in reality a running away, and if a tenant "runs away he entitles his landlord to take possession, without "making him compensation for the improvements which he "may have made upon the lands. The ground of our judgment "is this: there is no bargain made at the time when the tenant "left the farm that he should be paid for the improvements; "and as the case does not, for the reasons stated, fall within the "terms of the written agreement, he cannot claim for the "improvements under that agreement."

Certainly a man who runs away from his contract can hardly come and ask for the benefit of that contract. That case differs from the present in the most essential points as constituting the ground of the tenant's claim; namely, that in this case he does not run away, he does not quit the farm without the landlord's

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consent, but the landlord and the tenant agree, that, instead of holding the farm for the whole period of nineteen years, he should quit in the year 1844; and one may rather assume, from the language of Mr. Baron Bayley, that if those facts had appeared in that case, if there had been a contract by which the tenancy was determined, he would have been of a different opinion.

My Lords, it does appear to me that nothing could be more unjust than continuing this interdict, which, in effect, would be to take from the tenant the whole of the produce of the last crop,—although not within the terms of the original lease,—and if it had been within the terms of the original lease, the terms of the renunciation of the contract entered into between the landlord and the tenant permit the removal by the tenant of his property in the last year, and the produce of the last year of his tenancy, though not the last year of the nineteen. I move, therefore, that the interlocutor be affirmed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend. It is to be regretted that there should have been such great difference of opinion in the Court below, the learned Judges having been almost equally divided in their opinion on this subject. I consider that there cannot be anything more clear than that the words "hay and fodder of the "last crop excepted" is not a stipulation in favour of the tenant, but is only an exception of the obligation by him entered into in favour of the other party—the lessor. If it had been taken as a stipulation or a clause in favour of the tenant, then upon the terms to the renunciation, it might very fitly and logically have been contended, and with perfect accuracy, that he had given up and renounced the benefit of that stipulation, or the benefit of that clause in the lease in his favour; but it is not a clause in his favour, it is not a stipulation made by him as against his landlord, it is merely an exception, and a most rea-

sonable, and natural, and just exception in the tenant's favour, no doubt out of the obligation which, by the rest of the clause, by the words "not to remove or dispose of any fodder," and so forth, he had entered into in the other parts of that clause.

Being, therefore, of that opinion, the only question is, whether those words, "hay and fodder of the last crop excepted," apply to that which is the last crop according to the terms of the lease, namely, the crop of the nineteenth year, or whether they apply to that which becomes the last crop in whatever way. I am clear of opinion that it is not rational or sensible to give it any other construction than the latter of these two, namely, that it applies to the last crop, whatever that may be which legally is the last crop. Now that last crop, had it not been for the renunciation, would have been the crop of the nineteenth year; but the renunciation, and the acceptance of that renunciation by the landlord, make that the last crop which the tenant had said was to be the last crop, and which the landlord had consented by accepting that renunciation to make the last crop. If the landlord had intended to have bettered himself in that respect as a condition of accepting the renunciation, he might (which would have been a very obvious course) have said, "be "it always remembered, that, although I accept this renunciation, "and I determine your holding in five years instead of thirteen, "I do it on condition that you shall not have the benefit of the "exception of the last crop, because I mean that that exception "shall only be applied to that which by the terms of the lease "shall be the last crop, and I am now letting you off earlier than "that by fourteen years." I do not say that it would have been very fair to have done so in the case of an insolvent tenant, but, at all events, he might have done so. It is sufficient to say that he has not done so, and, therefore, that which he has suffered to be treated as the last crop, namely, the fifth year's crop, must by us be considered to be the last crop.

I really do not think there is any application whatever in

the cases which have been cited. I think my noble and learned friend has well dealt with them, and has thrown them very justly out of our consideration.

I cannot help lamenting very much that this case should have undergone so much litigation, both below and here, and particularly that it should have been brought here; for when it is said that this is a question of 300*l.*, it is nothing like 300*l.*; it is a question with respect to the rights of the two parties touching their different share of that 300*l.* which may be half as much; it can be no very large amount; and I may observe here, that had it been for the whole 300*l.*, it is one of those cases in in which it is, unfortunately for the Court, and not for a jury or any person acting as a jury to decide as if it were a matter of fact, because our practice has always held (and many lawyers as well as law-givers have been of opinion have too strictly held) that the construction of a written instrument is always matter of law, and is for the Court and not for a jury. But if the question is, what is the meaning of parties in using certain words in a written instrument, I must say that comes so very near a question of fact, that I have not mental organs enough to ascertain how little is the difference between that and a question of fact, and I cannot so nicely weigh the matter or deal with it so astutely as to ascertain it; but, nevertheless, the law says, and the practice of the Court is, that it is a question of law and not a question of fact. Consequently, all such questions of construction of instruments are withdrawn from the jury and are dealt with by the Court alone; but, nevertheless, this is only a question of fact, because the question is what the parties intended by the use of these words. It is neither more nor less than a question of fact. The decision in this case never can decide any other case than this; it never can be taken to rule any point of law or to touch or illustrate any principle in the world. It illustrates no principle but this, namely, the great nicety which prevails in our Courts in distributing the province of the Court and

of juries, or of Judges acting as juries, namely, between the province of law and the province of fact. Therefore, I very much regret that, in a case of this sort, which is in substance and effect that kind of case which in all the practice attaching both to the appellate jurisdiction and to the Scotch judicature, it was meant to exclude from appeal, namely, questions of mere fact—I am very sorry that this, owing to the nicety of the law in that respect, has been considered (which it is, no doubt) as a question for the Court, and that it has been brought here by appeal; but being brought here, I have no manner of doubt whatever that the Court below, although doubting upon it and differing in opinion very much upon it, have come to the right conclusion, agreeing with the Lord Ordinary and differing with the Sheriff Substitute in favour of the tenant and not of the landlord, in favour of the Respondent and not of the Appellant. I am therefore of opinion, with my noble and learned friend, that we have nothing to do but to advise your Lordships to affirm the judgment appealed from with costs.

It is Ordered and Adjudged, That the said Petition and Appeal be, and is hereby, dismissed this House, and that the said interlocutors therein complained of be, and the same are hereby, affirmed: and it is further Ordered, that the Appellant do pay, or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: And it is also further Ordered, that unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby, remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

G. and T. W. WEBSTER—RICHARDSON, CONNEL, and LOCH.

[HEARD 22*nd February*—JUDGMENT 15*th May*, 1849.]

The Rev. ARCHIBALD LIVINGSTONE, Minister of the parish of Cambusnethan, *Appellant.*

The Rev. WILLIAM PROUDFOOT, Minister of the parish of Avondale, and others, *Respondents.*

Church—Courts—Corporation.—The sentence of a Church Court is not void because some of the persons who sat and voted as members were not qualified.

IN the year 1834 the General Assembly of the Church of Scotland passed an Act of Assembly, by which, of their own authority, they declared, that all ministers of chapels of ease should be constituent members of the presbyteries and synods within whose bounds their chapels were respectively situated, and should enjoy every right and privilege of parish ministers; and enjoined the church courts within whose bounds the chapels were situated, to receive and enrol the ministers as members of their bodies, and put them in all respects upon a footing of presbyterian equality with the parish minister.

In the year 1843, in the case of the parish of Stewarton, the Court of Session found that this Act of Assembly was illegal, and *ultra vires* of the General Assembly, as the sole power of disjoining and erecting parishes was vested in the Court of Commission of Teinds.

The Appellant, as minister of the parish of Cambusnethan, was a member of the presbytery of Hamilton in the year 1834, and continued to be a member until the proceedings were adopted against him, which will be presently noticed. After the passing of the Act of Assembly of 1834, several ministers

of chapels of ease within the presbytery of Hamilton were admitted members of that presbytery, and sat and voted as members in all the deliberations of the body, which by this addition was increased from fourteen members (its original number) to twenty-four.

In the month of March, 1840, the presbytery of Hamilton, thus constituted, served a libel upon the Appellant, charging him with various acts of theft. The libel, which was signed by the minister of one of the chapels of ease, acting as moderator of the presbytery, was followed out by judicial procedure, in which the Appellant appeared as party defendant.

On the 29th October, 1840, the presbytery found certain of the acts of theft charged against the Appellant to be proven. Several ministers of chapels of ease were present and voted at the sitting of the presbytery at which this finding was made.

On the 27th May, 1841, the Appellant presented a note to the Court of Session, praying suspension and interdict of the proceedings of the presbytery, and obtained the prayer of the note for want of answers or appearance.

On the 23rd April, 1842, the Appellant likewise raised a summons, concluding for reduction of the proceedings of the presbytery and declarator, that the presbytery as a church court was composed exclusively of ministers of parishes within the bounds of the presbytery, and of elders from the Kirk Session, and that no ministers of chapels of ease or of districts, or churches attempted to be erected into parishes and parish churches by ecclesiastical authority alone, whether *quoad sacra* or *quoad omnia*, had any title to vote or act as members of the presbytery, and that the collective body of the presbytery, including the ministers of chapels of ease, had no jurisdiction *quoad* the Appellant, in any matter or cause ecclesiastical.

Notwithstanding these steps of procedure, the presbytery of Glasgow, on the 26th April, 1842, referred the Appellant's case to the General Assembly, before which it cited him to

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appear. On the 27th May, 1842, the General Assembly pronounced sentence of deposition against the Appellant, who, by his counsel, declined their jurisdiction, or to appear before them.

The processes of suspension, and reduction, and declarator, were afterwards conjoined, and on the 14th January, 1846, the Lord Ordinary (*Cunninghame*) pronounced the following interlocutor:—"Finds that the judgment of the presbytery of "Hamilton in 1841, which the Pursuer now seeks to have "suspended and reduced, proceeded on a libel raised before "the presbytery in 1840, charging the Pursuer with very grave "offences: Finds that the charges thus preferred against the "Pursuer were prosecuted solely as ecclesiastical delicts, and "the libel concluded against the Pursuer only for such censure "and punishment as an ecclesiastical court could inflict: Finds "that the said presbytery, as the only local ecclesiastical court "acting in the district for the time, entertained the case and "sustained the libel—and the Pursuer, without objecting to "the court, or to any of the members thereof, joined issue on "the merits before the presbytery—and, after a long probation, "and much discussion on the proof, he was, in October, 1840, "found guilty by the said presbytery, unanimously, of a large "portion of the offences charged against him: Finds that the "said presbytery of Hamilton, both at the date of the said "libel and sentence, was composed in part of ministers of "chapels and of churches, having a certain territory annexed "to them *quoad sacra*, who had been admitted members of "presbytery, and of the other church courts, in terms of the "authority of the General Assembly of the Church: Finds "that neither the Pursuer nor any other party stated the "objection now urged to the constitution of the presbytery "till May 1841, when the Pursuer, after judgment of con-"viction had passed against him, as aforesaid, presented the "note of suspension now in dependence: Finds that nothing

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" relevant is averred by the Pursuer to show, that the pres-
" bytery of Hamilton, as constituted in 1840 and 1841, did not
" act in *bonâ fide* and legitimately throughout the proceedings
" which took place against him, or that he is now entitled to
" object to the jurisdiction and proceedings of the presbytery,
" as constituted when he pleaded before them: Therefore, in
" the suspension, repels the reason of suspension: Finds the
" letters orderly proceeded, and decerns: and in the reduction,
" finds the reasons of reduction incompetent and irrelevant,
" and therefore dismisses the action, and decerns."

On the 27th June, 1846, the Court adhered to this interlocutor. The Appeal was against the interlocutors of the Lord Ordinary and of the Court.

Mr. Bethell and *Mr. Anderson* for the Appellant.—The legality of the proceeding against the Appellant must depend on the legality of the body by whom they were instituted and followed out to sentence. The libel was at the instance of the presbytery of Hamilton, a body which by law could consist of only fourteen members, but which at the time did consist of twenty-four members. The additional ten persons who took part in the proceedings were entire strangers to the whole matter, and had no more right to join in it than any humble parishioner. Rex *v.* Gudridge, 5 *Bar.* and *Cres.*, 459; Rex *v.* Justices of Hertford, 2 *Qns. B. Rep.*, 753; Graham *v.* Lafitte, 3 *Moore*, 382, establish the proposition that the act of a joint body is regarded throughout as a joint act which cannot be severed so as to ascertain the amount of influence of each of the body. The whole procedure, in the present case, therefore, must be void, by reason of the part taken in it by those members who had no right to join. But even if it were allowable to inquire as to the part taken by each member, it would be impossible to ascertain whether the result was not procured by the votes of the foreign members; the necessary consequence

is, that the procedure being carried on at the instance of a body not legally constituted, the whole must be void.

It is no doubt true, that if one having lawful authority to confer a judicial office, appoint another to it, the party appointed is the bearer of the lawful authority, although from some personal reason he may not be qualified; he is so until the defect of qualification is ascertained, and for the sake of general convenience his acts are recognised. Thus, if the Crown appoint a judge, what is done by the judge is held as emanating from lawful authority, although it may afterwards be found that the party was not competent to assume the office. But the General Assembly had no authority to reconstruct presbyteries or introduce these new members into the presbyteries. Its act in this respect was assumption of a power which it did not possess. The jurisdiction, therefore, which the presbytery exercised cannot be held as having emanated from lawful authority. The case was likened in the Court below to that of Barbarius Phillippus, which occurs in the *Digest*, i. 14, 2, where the acts of a pretor were sustained although he was disqualified from holding the office by being a slave, a fact which was not known to the people at the time of his election; but that case is no way different from the one already put. In Rome the people were the sovereign authority and elected the pretor, and in the Digest what was done is expressly rested upon this, that the pretor was appointed by and for the benefit of the people, and therefore his acts should be maintained for their benefit, and that the people, as the sovereign power, might confirm as well as appoint; and so is the comment of *Voet*, p. 62. Here the General Assembly did not bear the same relation to the presbytery that the Roman people did to the pretor. They possessed neither sovereign nor subordinate authority for the erection of parishes or the introduction of members to presbyteries.

It cannot, therefore, be said that the act of the Assembly

should be sustained as the act of a body *de facto* exercising a public office; for the act of the foreign members of the presbytery in voting in this procedure was not the act of parties *de facto* holding the office of presbyters, inasmuch as the number of fourteen presbyters was already full before these persons were appointed by the illegal act of the General Assembly; they were, therefore, presbyters neither *de facto* nor *de jure*, but persons assuming to hold and exercise an office already filled by persons legally appointed. Not only so, but the libel upon which they proceeded was signed not by one of the persons duly appointed, but by one of these strangers who was acting as moderator for the time. On this ground alone the whole proceeding is *funditus* void.

The cases in the law of Scotland fully support the Appellant's proposition. In Cumming *v.* Munro, 12 *Sh.* 61, the proceedings upon a summons signed by the substitute of a sheriff clerk depute were declared to be void, because such an officer had no power to appoint a substitute: and in Forrest *v.* Harvie, 4 *Bell's App. Ca.* 197, proceedings before magistrates of a burgh acting as justices of the peace were declared to be illegal, because the warrant of citation had been signed by the clerk of the magistrates instead of the clerk of the peace. In that case an opinion was expressed, that the procedure might have been legal if the party had been *de facto* clerk of the peace, although he was not so *de jure*. But here, as already observed, the ten foreign members of the presbytery were so neither *de facto* nor *de jure*. And Russell *v.* Lang, 2 *Bro.* 211, shows that participation in the duties of a judicial office by one not duly qualified vitiates the acts of another, though duly qualified: there, a sentence pronounced by two justices was declared to be void, because one of them had not been present at a previous diet at which the proof was taken, although by the statute only one justice was required. The presence and vote of the one who was not qualified to act was treated as nullifying the

sentence, though concurred in by the other who was qualified to make it by himself alone—a case which is precisely analogous to the present.

The decree below, furthermore, is rested on the *bonâ fides* of the Assembly in the proceedings against the Appellant. But it is not very apparent in what manner the conviction of a Judge that he has authority, in however good faith that conviction may be founded, can confer the authority upon him if he has it not otherwise.

Again, it is said that the Assembly was holden and repute a legally constituted Court. That doctrine can only apply to an authority grown grey with age: here, the Act of the Assembly which admitted *quoad sacra* ministers, was protested against at the time by members of the Assembly itself, and thenceforth, until the invalidity of the Act was declared, was the continual subject of discussion among the members of the Church Court. It is impossible, therefore, to say that the Assembly had ever acquired by habit and repute the character of a legally constituted body. The decree is also rested on homologation by the Appellant in appearing before the Assembly and taking part in the proceedings; but jurisdiction otherwise awanting cannot be conferred by the consent of the litigant.

Mr. Rolt and *Mr. R. Palmer* for the Respondents, cited *Pand.* i. 14, 2; *Stair* iv. 42, 12; *Ersk.* iv. 2, 6; Douglas *v.* Chiesly, *Mor.* 3092.

LORD CHANCELLOR.—My Lords, the appeal in this case presents a question of very great importance; seeing that if your Lordships should be of opinion that the Judgment of the Court of Session is wrong, it raises the question,—whether any proceeding in any of the Ecclesiastical Courts, where *quoad sacra* ministers have been admitted as members from the year 1834, when the General Assembly first declared that they were

properly members of the presbytery, up to the year 1843, when it was finally established that they were not, have any legal validity whatever?

This cannot be more strongly exemplified than in the language of the summons, which, after stating that ministers of chapels, or *quoad sacra* parishes, had been received and admitted, and had acted as members of presbyteries, and among others of the presbytery of Hamilton, during that period, states the consequence in these words—"which collective body has "henceforth, and in consequence thereof, illegally usurped, and "attempted to exercise, the functions of the presbytery of "Hamilton; that, accordingly, from and after the period when "this illegal and unwarrantable attempt was made to introduce "into, and incorporate with, the presbytery of Hamilton, "chapel ministers, not members of the said presbytery, no "meeting of the presbytery of Hamilton has taken place legally "and validly constituted to any effect whatever; but in place "of the said presbytery of Hamilton, the anomalous and self-"constituted body aforesaid, composed partly of the members "of the said presbytery, and partly of the chapel ministers "above mentioned, have convened and attempted to exercise "jurisdiction, as if they had been the presbytery of Hamilton."

Now, my Lords, if the presbytery of Hamilton be held incapacitated from performing any of the functions of a presbytery, in consequence of those *quoad sacra* ministers having, during that period, been considered as properly members of the presbytery, the same observation, and of course the same infirmity, applies to all other presbyteries into which *quoad sacra* ministers had been admitted; and applies, of course, to all those bodies which derived their authority in any way from those presbyteries. It applies to all ecclesiastical authorities in Scotland, not excepting the General Assembly itself. The consequence of which would be, that during the period from the year 1834 to the year 1843, there would not only have been

no law capable of being exercised by any of those functionaries, but every thing they did, and which was supposed, therefore, to bind the parties, would be established to be absolutely and entirely void. No minister ordained by them would, in fact, be a minister: no licence granted would be valid, during the whole of that period: and Scotland would be in a much worse situation than if it had had no law, and had possessed no ecclesiastical authority; because, the public was told that there was a law. But this house, if it were not to affirm the interlocutor of the Court below, would be establishing that the parties were all deceived; and that, in point of fact, all the transactions of those bodies were void.

It is however, my Lords, fortunate, that in looking into the authorities there does not appear to be any danger of any such result; for I apprehend, that if your Lordships consider what the authorities are that were brought under your notice in the course of the argument, you will be of opinion that there is no question that the Judgment of the Court of Session is correct.

My Lords, the general proposition which is here set up, is, that with respect to any body constituted of a variety of persons, or of more persons than one, although the collective body be the authority upon which the law imposes certain duties, it does not become a body authorized by law to perform those duties, if there be amongst it some members, or one member (because this applies if to many, to one), who is not a properly constituted member of the body.

My Lords, the question whether there was a majority of what are now established to be correctly constituted members, or not, is a matter which, in many cases, it may be impossible to investigate; and, moreover, the objection before your Lordships, in fact, goes to the body itself, as having been contaminated by the presence of an individual not properly qualified to act as a member of the body so constituted.

Now, my Lords, the particular case under your Lordships' consideration is also peculiar on another ground, namely, that the party raising this objection, being a minister of a parish within the bounds of the presbytery, was himself a member of this presbytery, and acted as such, during the period in question. Unfortunately, however, for him, though he was a member of this presbytery, he was a party against whom the presbytery thought it their duty to proceed for the very disgraceful offence, not in one, but in several instances, of direct and palpable theft, and of which offence he was found to be guilty by the presbytery. He afterwards carried this decision to the General Assembly, and there it was confirmed that he had been guilty of the offence for which he had been prosecuted by the presbytery, of which he himself was a member. That took place in the years 1839 and 1841, during which period those *quoad sacra* chapel ministers were members of this presbytery. But in the year 1842, after this Judgment against him had been confirmed, he discovered or alleged that the presbytery by which he had been accused, and by which he had been adjudged, in point of fact, had no jurisdiction whatever, upon the ground I have stated, namely, on account of those chapel ministers being elected and acting as members of this presbytery; alleging that all their acts were void, and, amongst others, those acts which they had adopted, and by which they had proceeded against himself. And he proceeded by summons of declaration and reduction, praying that this proceeding should be considered null and void, as having taken place *coram non judice*. It remains, therefore, for your Lordships to consider (for that raises the general question), whether the presence of one unqualified party makes the whole of the acts of the collective body inoperative and void.

My Lords, this point more frequently occurs in the case of corporations, where the members of a corporation, incidentally exercising judicial functions in the office of magistrates, grow-

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ing out of their position as members of the corporation, are not well founded in the position which they hold in that corporation. Now, I do not find that the point is distinctly raised here, that the acts of a corporation, although some of its members be afterwards found not to have been legitimately members of that corporation, are null and void, because there were amongst them some whose title could not be supported by any legitimate means—one cannot distinguish, or see why the acts of a corporation should be valid under those circumstances, if the general proposition be maintainable that the acts of a collective body are to become void, because some one or two or three members of it have not a strict legal title to the position which they profess to hold. But, however, it is so obvious, and so palpable, that that rule could not be applied to the acts of corporations; that very little was said upon that point in the argument; and very little is said about it in the papers: and if there had been any question about it, the case which has been referred to, of the burgh of Culross, would have been quite conclusive upon that point.

Now, my Lords, if there be no doubt, and indeed it is almost admitted, that the rule contended for by the Appellant would not apply to a corporation, that will go a great way to decide this question. It remains then to be considered, whether to such collective bodies as presbyteries, any such rule applies, as that which has been contended for by the Appellant.

My Lords, for this purpose, we look in the first place to the foundation of the law of Scotland; and first, to the civil law, where the contrary is most distinctly laid down by most competent authorities.

Then we come to those who have treated of the law of Scotland, and we find Lord Stair entertaining no doubt upon this question, but laying down the law with perfect clearness and in a manner quite devoid of all uncertainty, for he says; there is no relevant objection by denying that the Judge had

authority; "and if the same be alleged by way of reduction, "*holden* and *reputed* will be a sufficient defence," (Mr. Erskine also lays down this rule, not in the very same words, but to the same effect,) by which Lord Stair means, not the case of a stranger unquestionably assuming to himself a position which does not belong to him; but that if a party be exercising the duties of an office, and be holden and reputed the holder of that office, the acts which he does and which are within the power and jurisdiction of that office, are to be held good, although it may afterwards turn out that he had no title to the office he so professed to hold.

My Lords, a case was also referred to, the case of Douglas, in Morrison, 3092, which establishes the same rule as being the recognised law of Scotland. In an action pursued by George Douglas against Chiesley, "the Lords repel the exception "founded upon the Act of Parliament, 1567, anent sasines to "be given in within burgh by the town clerk." There, the objection was, that the party acting, although performing the duties of town clerk, was not in fact the town clerk, the Act requiring the duties to be performed by the town clerk. The question, therefore, was, whether the act done was good, or failed on account of the failure of the title of the party professing to be town clerk. It is stated, that the Act was sustained "in respect of the reply, that it was offered to be proven that "Mr. George Douglas was reputed and holden to be town "clerk; and that, notwithstanding, they offered them to prove "that there was another town clerk." That affords a strong illustration of the rule that, in the case of a party professing to hold an office, and holden and reputed to hold that office, of which he was exercising the duties, the acts done by him shall be valid; although upon investigation it turn out, that he had no right to the office of which he thus performed the duties.

My Lords, one looks with some anxiety to what the rule in this country is; and we find that all the earlier writers lay

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down the same rule as that which is applicable to Scotland. My Lords, in Croke, Elizabeth, we find this case stated as the ordinary rule: "Acts done by an officer *de facto*, and not *de jure*, " are good, as 9th Edward IV, Parliament 1; acts done by a King, " an usurper are good; so if one being created a bishop, the " former bishop not being deprived or removed, admits one to " a benefice upon a presentation, or collates by lapse, these are " good and not avoidable—*quod curia concessit*—for the law " favours acts of one in a reputed authority, and the inferior " shall never inquire if his authority be lawful." That is of the date of Croke, Elizabeth.

We now come to the same rule laid down by Lord Chief Justice Abbot, in the case of the Margate Pier Company against Hanman, 3 *B.* & *Ald.* 266, where he observes: "Many " persons acting as Justices of the Peace, in virtue of offices in " corporations, have been ousted of their offices from some " defect in their election or appointment; and, although all acts " properly corporate and official done by such persons are void, " yet acts done by them as Justices, or in a judicial character, " have in no instance been thought invalid. This distinction is " well known. The interest of the public at large requires that " the acts done should be sustained."

We therefore find, that according to the law of Scotland, as established by the authorities to which I have referred; and the law of England, as established in like manner by the authorities, and which authorities concur, and most reasonably and rationally concur; the rule is, that as to those who are known and "holden and reputed," according to the language of the cases, to be the proper possessors of and exercising the duties of an office, their acts shall be good so long as they hold and exercise the duties of those offices; although, in point of fact, they may not have, upon investigation, any title to the offices of which they were so exercising the duties.

There were some cases relied upon by the counsel for the

Appellant, which raise a proposition contrary to that which the cases I have already referred to seem to establish; and particularly the cases of Cumming *v.* Munro, and Forest *v.* Harvey. But your Lordships will find, that both those cases fall under a very different description; they were both cases of offices and authorities assumed, but which had no existence in law; and not, therefore, cases of disqualified persons exercising known offices and authorities.

My Lords, in the case of Cumming *v.* Munro it was a process, not by the sheriff-depute, nor by the sheriff-substitute, but by a person appointed by the sheriff-depute; whereas the Act which authorized and directed the act to be done, specified that it should be done by the sheriff or by his depute, and went no further. Therefore, there was an act done by a party not claiming an office, or professing to be the holder of the office, but by a person, who, by the Act of Parliament under which he was professing to act, had no authority at all for that which he did.

Other cases were referred to, which are also clearly distinguishable from the present. Those were cases in which a superior Court exercised its authority over an inferior Court, for not having acted in the due execution of the jurisdiction given to it. As, for instance, where a jurisdiction had been given, by an Act of Parliament, to an inferior Court to perform certain duties, prescribing the mode in which those duties were to be performed, and it appeared that the inferior Court had not performed them, or had exercised them in a manner different from which the Act prescribed, and where the sole authority was derived from the Act of Parliament; it was clearly competent for the superior Court to interfere there; or, if the inferior Court, subject to the jurisdiction of the superior Court, had improperly conducted itself in the execution of an acknowledged authority; there, of course, the superior Court would interfere to set aside the act.

But your Lordships observe, that in those cases it is not a question of jurisdiction, but a question of interference by a superior Court in the case of an inferior Court having acted in a manner not authorized by law. And the same distinction applies to several modern English cases that were referred to, as the King *v.* Gutteridge, and the Queen *v.* the Justices of Hertfordshire. In those cases there was no question as to the jurisdiction of the justices, but the Court of Queen's Bench held that they had not properly exercised it. In the present case, the jurisdiction of the presbytery as constituted is disputed.

My Lords, it appears to me, therefore, that these cases do not interfere with the authorities directly applicable to this case; and that the interest of the public, legal principle, and the highest authorities, all concur in showing that the decision of the Court of Session ought to be affirmed.

LORD BROUGHAM.—My Lords, I entirely concur in the view expressed of this case by my noble and learned friend. I had no doubt, indeed, from the moment that I could apprehend fully the facts of the case, and the grounds on either side upon which the arguments were rested. My Lords, I consider that if any other decision were come to than this, a door would be opened for the admission of most perilous consequences to the due and regular and valid proceedings of all bodies whatsoever. For I can see no difference whatever between the case of a presbytery, as far as regards those *quoad sacra* ministers being a part of the presbytery, and the case of any other public body acting by persons whom they have acknowledged as members of their body, which persons are made members of their body by a particular qualification of any sort, or by a particular mode of appointment of any sort; as for instance, by election, or by selection by a superior authority. By popular election we will say, as representatives, or by selection by a superior authority. If the presence at any one of its deliberations or decisions of

persons who, at the time, were supposed to have a title, but who, by the result of an inquiry, were found not to have a valid title—if their presence at the time, afterwards found to have been illegal, or we will say invalid, should be held sufficient to make null and void and of non-effect all the steps taken, and all the proceedings had by that body of which they had been improperly members, or had been irregular members, or with a void qualification—if, because they were so void of qualification, the whole steps which were taken, and the decisions come to, or the acts done by that body were, therefore, to be rescinded as void in themselves, I consider that consequences of the most grievous nature, entailing the highest possible confusion and public inconvenience, would result. It therefore gave me great satisfaction to find, upon looking into the authorities,—whether of the Civil Law or of the Scotch text-writers, or of the decided cases,—that whatever doubt might arise upon the first imperfect or vague statement of the purport of these authorities, when we came to sift those authorities, there was no ground whatever for maintaining that negative proposition, namely, the invalidity of the acts done, and that those authorities were of no force and effect against the judgment under your Lordships' consideration.

My Lords, perhaps the authority that would make most impression upon your Lordships was one of the decisions in the Court of Queen's Bench in this country—the case of the Queen *v.* the Justices of Hertfordshire. Now, my Lords, there was in that case one of the most extraordinary circumstances that could well arise for the purpose of invalidating, or at least of taking away all respect from, a judicial proceeding, apart from the matter in dispute—for there, one of the justices was an interested party. If such a thing as that takes places, it almost partakes of the character of fraud; and the Court in that case viewed the proceeding as positively corrupt, and set it aside. But I do not intend to quarrel with that decision. It suffices

for my present purpose to say, that that case is not this case; and that it does not bear upon it, to the effect of ruling this case. And, therefore, I am in no manner governed by it in forming my opinion upon the merits of this case, or induced to advise your Lordships to take a course which would be against the sense and reason of the thing, by giving a decision contrary to that of the Court below.

My Lords, upon the whole, therefore, I certainly concur with my noble and learned friend, and agree in supporting his proposition to your Lordships, that you should dismiss this appeal, and affirm the decision of the Court below, as usual, with costs.

LORD CAMPBELL.—My Lords, this seems to me to be a very clear case. However disastrous the consequences might be, if by law all the proceedings of the Ecclesiastical Courts of Scotland, for a great number of years, were found to be void; yet if the authorities were sufficient to establish that point, your Lordships would doubtless feel bound to pronounce judgment to that effect. But it seems to me, that neither upon principle, nor upon authority, is it necessary to come to a conclusion in favour of such a proposition.

Your Lordships will always bear in mind, that this is not the case of the act of a single person; and, therefore, you are not driven to any nicety with regard to the different distinctions that have been taken with reference to acts that are void or voidable. This is the act of a community, where there was an assemblage of gentlemen; and it is admitted, that if these *quoad sacra* ministers had not been present, all the proceedings of the presbytery would have been regular and valid. My Lords, I am clearly of opinion, that their presence does not invalidate what took place, and upon two grounds: first, that the *quoad sacra* ministers had a *primâ facie* title, and were there acting *bonâ fide*, and were believed to have a right to be there as much

as the ministers of the different parishes that belonged to the bounds of the presbytery; and secondly, that if they had been strangers, as there was still clearly a majority in the community in favour of the act done, the act was a valid act.

My Lords, I am very glad that there is neither decision nor dictum that at all supports the monstrous proposition contended for on the part of the Appellant. The only case having any analogy in principle to the present, is that to which my noble and learned friend who last addressed your Lordships has referred, the Queen *v.* the Justices of Hertfordshire, which, however, proceeded wholly on the ground of fraud; and if it had proceeded on any other ground than that of fraud, I myself should not at all concur in the judgment that was given in it. Therefore, setting the consideration of that authority aside as not applicable, or not to be supported, there is no authority that can be adduced at all to support the proposition that has been contended for by the Appellant.

I have, therefore, my Lords, no hesitation at all in concurring with the opinion of the noble and learned Lord on the woolsack, that the judgment of the Court below ought to be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

DEANS, DUNLOP and HOPE—SPOTTISWOODE and ROBERTSON.

[HEARD 11*th*—JUDGMENT 13*th July*, 1849.]

ALEXANDER SMITH, W.S., Edinburgh, *Appellant*.

THE RIGHT HON. JOHN HAMILTON DALRYMPLE, EARL OF STAIR, and others, Her Majesty's Officers of State for Scotland, for Her Majesty's interest, *Respondents*.

Title to Sue—Crown.—The Crown has a title to prevent, by application for interdict, any encroachment by the proprietors of ground adjoining the sea-shore, upon the enjoyment of the shore by the lieges for the purpose of passage or of relaxation.

Property—Bounding Charter.—A proprietor of ground, described by his title as being of a specified extent, and as bounded by the sea shore, has no right to inclose that part of the shore which is covered by the sea only in ordinary spring-tides, over which the public has been from time immemorial in the habit of passing, and over which he cannot prove any past use or possession by himself.

Crown-Costs.—No costs given to the Crown in an action by it to protect the rights of the public in the sea-shore.

THE Marquis of Abercorn was infeft in the lands and barony of Duddingston, under charter from the Crown, "alga fucoque "maritinis lie wrack, wath, wave," &c. This charter proceeded upon a disposition and deed of tailzie, which reserved power to the Marquis and the heirs of entail, notwithstanding the prohibition therein contained, to grant small feus of any part of the tailzied estate not encroaching upon the manor-place and pleasure-grounds; no feu so to be granted exceeding one-eighth part of an acre.

In 1805 the Marquis, considering that Stewart had made an offer "for one-eighth part of an acre of that piece of ground,

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" being part of the lands of Rabbit Hall, as the same is staked " off and measured by William Morrison, marked upon the " plan thereof, A," granted him a feu charter of " all and whole " the foresaid piece of ground, being lot A of the feus of Rabbit " Hall, bounded as follows; viz., *by the sea-shore* on the north; " by lot B, feued to Alexander Brown, on the south; by that " road fifty feet broad, running from the high road to the sea, " on the west; and by our said lands of Rabbit Hall on the " east parts lying within the parish and barony of Duddingstone " and sheriffdom of Edinburgh, and whole parts, privileges, and " pertinents of the same."

A dwelling-house was built upon this feu, which, together with others on either side of it, formed part of the town of Portobello. Ultimately the feu was acquired by the Appellant.

The sea-shore opposite the feu, and for a very considerable distance on either side of it, consists of an extensive stretch of open sands, which in *spring*-tides are entirely covered by the sea. That part of the sand which is covered by the *ordinary* tides is firm and solid; while that which is more landward, and covered only by spring-tides, is loose and deep. The inhabitants of the neighbouring town of Portobello and of the surrounding country have for time immemorial been in the habit of using these sands for the purpose of bathing, riding, and walking, and the royal troops have been in use to be exercised and reviewed upon them.

When the Appellant acquired his feu a wall ran along the inner edge of the belt of loose sand. In the year 1842 the Appellant pulled down this wall, and was in course of erecting another thirty feet more seaward, but still, as he alleged, within the belt of loose sand, when he was interrupted by an application for an interdict presented by the Respondents. By arrangements between the parties, the wall was allowed to be completed, upon the understanding that the case for an interdict should be tried upon the question to be presently noticed as "*matter of*

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law;" and that if that question should be answered in the negative, the wall should be pulled down. The question of law thus agreed upon was, "Whether—*assuming* in point of fact "that the wall of the Respondent, Mr. Smith, extends beyond "the high-water mark in *ordinary* spring-*tides*—he is, with "reference to the terms of his titles and the rights of the "Crown, entitled to have the wall maintained in that position; "and it is agreed that the record shall be closed, if necessary, "to give effect to the judgment to be pronounced."

The Lord Ordinary made great avisandum to the second division of the Court with cases for the parties. After considering these cases, and hearing counsel, the Court, on 11th of March, 1846, pronounced the following interlocutor: "Grant "the interdict, and declare it to be perpetual, so far as relates "to the encroachments complained of, and extending thirty feet "towards and into the sea over the sands."

This was the interlocutor appealed from.

Sir F. Kelly and *Mr. Anderson* for the Appellant.—I. The grant of a barony carries with it a right to the land between the high and low water mark of ordinary tides. McAllister *v.* Campbell, 5 *D. B.* & *M.*, 490. Any right, therefore, to the ground in question, which was originally in the Crown, became vested in Lord Abercorn, the Appellant's author. The Crown, therefore, has no title to interfere in the way that has been attempted; for in McAllister's case, although there was no mention in the titles of the sea being the boundary, yet the fact being that the sea was the boundary, it was held that the Crown having granted the land on the sea had no right in the shore without an express reservation to that effect.

[*Lord Campbell.*—In McAllister's case there was the conjunction of title with possession. That don't establish a right where the title makes no mention of the shore, and there is *no* possession.]

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No possession as against the Crown is necessary. The title is sufficient.

II. The right which was vested in the Marquis of Abercorn is now in the Appellant by virtue of the feu disposition from his Lordship, to which the Appellant has acquired right. Campbell *v.* Brown, 18th November, 1813, *F. C.* 444. It is not necessary for this purpose that the disposition should expressly convey a right to "wrack and wave," to which the Marquis was entitled by his charter; the right to these was sufficiently given by the conveyance of "parts, privileges, and pertinents." Leven *v.* Magistrates of Bruntisland, *Hume's Dec.*, p. 555.

III. The right which was in the Marquis being in the Appellant, by virtue of his feu disposition, which describes the boundary of his feu to be the "sea-shore" on the north, the Appellant is entitled to appropriate whatever ground is not covered by the ordinary tides; for that is not sea-shore which is never covered by the sea unless by spring-tides.

Stair, ii. 1, 5, says, "The shore in the civil law is defined to "be so far as the greatest winter tides do run, which must be "understood of ordinary tides, and not of extraordinary spring-"tides;" and in the same passage he says, "The use of the "banks of the sea ofttimes belong to private persons, by their "proper right, or by custom, or by public grant." And *Ersk.*, ii. 6, 17, "Though by the Roman law the sea-shore "reached as far from the sea as the highest spring-tide, it goes "no further, by the custom of Scotland, than the sand over "which the sea flows in common tides; and by our constant "practice proprietors who border on the sea inclose as their "own property grounds far within the sea-mark." As authority for this he refers to Bruce *v.* Rashiehill, *Mor.*, 9,342, where it was found that sea greens were not *inter regalia*, and that they might "belong to the neighbouring heritors as part and perti-"nent, without a special right." The authority of Bell in his *Principles*, from sect. 641 to 644, is to the same effect. In

Innes *v.* Downie, *Hume's Rep.*, p. 552, a bank of shelly sand covered by the sea in ordinary tides was found to be a pertinent of the adjacent lands. In the Magistrates of Culross *v.* Geddes, *Hume's Rep.*, 554, it was found that a proprietor had right to inclose and gain on the sea under a feu right to lands bounded by the sea-shore. The decisions in Campbell *v.* Brown, 18th November, 1813, and in Boucher *v.* Crawford, 30th November, 1814, were to the same effect; and so were the opinions of the Judges in Kerr *v.* Dickson, 3 *Dunlop*, 154.

The English authorities run the same way. In *Hale's M.S.*, as published in *Hargrave's Tracts*, at p. 12 he says, "that which the sea overflows, either at high spring-tides, or "at extraordinary tides, comes not, as to this purpose, under "the denomination of *littus maris*, and consequently the King's "title is not of that large extent, but only to land that is "usually overflowed at ordinary tides." And again at p. 26 he says, "There seem to be three sorts of shores or *littora* "*marina*," and after describing that created by the high spring-tides at the equinoxes, as belonging to the subject, he continues: "The spring-tides which happen twice every month "at full and change of the moon, and the shore is by some "opinions not denominated by these tides neither, but the "lands overflowed with these fluxes ordinarily belong to the "subject *prima facie*, unless the King hath a prescription to "the contrary." He then speaks of "ordinary tides or nepe-"tides," and goes on, "this is that which is properly *littus* "*maris*." *Hall*, on Sea-Shores, at p. 8, is to the same effect. In Blundell *v.* Catterell, 5 *B.* & *Ald.* 291, *Holroyd* and *Bailey*, Js., said the shore was the land "between the *ordinary* high "and low water-mark;" and in Lowe *v.* Govett, 3 *B.* & *Ad.* 863, it was ruled, that soil overspread with sea and beach, and covered by the high water of spring-tides, but not by the ordinary tides, was to be presumed to belong to the owner of the adjoining estate.

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Mr. Bethel and *Mr. Elliott* for the Respondent.—Fact is better than argument. The Appellant is precluded by his title from averring that he has a right to inclose the land in question. By the Abercorn entail the heirs have a special power to grant land for building purposes, not exceeding in each instance one-eighth of an acre. The contract of the Appellant's author with Lord Abercorn was made under this power, and was specifically for the limited quantity of one-eighth of an acre, and his feu disposition gives him that quantity and that alone. The boundary of this specific grant is the sea-shore, and the possession has been conformably until the attempt complained of was made. The Appellant cannot alight on the shore, therefore, without overstepping his boundary. By his disposition he has a grant of one-eighth of an acre, and cannot be heard to say that it gives him thirty yards more, or what it was not in the power of his author to grant.

With regard to the title of the Crown to prevent the encroachment complained of, all the authorities admit that the shore is originally in the Crown, to grant to whom it will; that the right of property is in the Crown with all necessary use in the subject. Now the charter to Lord Abercorn expresses by its terms a gift of what it was in the power of the Crown to grant, but is no way inconsistent with a reservation of enjoyment of the beach by the public. In fact the Crown cannot grant anything derogating from the right in it necessary to protect the right of ordinary use in the public, and the Crown has necessarily a title to protect this use for the public.

The Respondents' counsel then went into an elaborate argument in contradiction of that used for the Appellant, in regard to what is to be understood by the sea-shore and the rights of adjoining proprietors, in the course of which they cited the King *v.* Seafield, *Balf. Prac.*, 2 *Rolls Abr.*, 170, tit. *Prerog.*; 3 *Dyer, de Alluvione;* Attorney *v.* Johnston, 2 *Wils.* 87; *Bell's Dict.*, 888; *Ersk.* ii., 6, 17; *Bank*, p. 83; *Callis on Sewers*, p. 45;

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Hale's M.S., Hargrave's Tracts, p. 12; Attorney *v.* Parmeter, 10 *Pr.* 378; Attorney *v.* Burridge, 10 *Pr.* 355; Ker *v.* Dickson, 3 *Dun.*, 154. But the view which the House took of the case makes it unnecessary to notice this argument.

Sir F. Kelly in reply.—Unless the effect of the reservation of a specific boundary in the Appellant's title relied upon by the Respondents is to convey to the Crown all beyond that boundary, which will hardly be alleged, the Crown can have no title to interfere to protect that which *ex hypothesi* of its not being in the Appellant, is, at all events, in the Marquis of Abercorn by virtue of his charter.

LORD BROUGHAM.—My Lords, in this case a very important question was raised. Mr. Smith, possessing certain lands in the immediate neighbourhood of the sea-shore at Portobello, a village at some short distance from Edinburgh, under a grant from the Marquis of Abercorn, built a certain wall encroaching upon the sea-shore, as it was contended by the Respondents, encroaching as it is contended upon that which is the property either of the Crown or of the public, or of the Crown with an easement to the public, or of the Crown and the public jointly, it signifies very little which, with a view to the bearing of the matter upon the present question.

The officers of State who represent the Crown here proceeded against Mr. Smith for this purpresture or encroachment, and Mr. Smith sets up as his defence, in the first place, that he was not a wrong-doer, because he had a right to build the wall in consequence of his title to the ground immediately adjoining the sea. In the second place, he states, that even *be* it that he was a wrong-doer still the Crown had no right to interfere, unless the Crown could show some title either to the property or in some other respect; and there can be no doubt that either if Mr. Smith had a right to build that wall, or be it that he was

a wrong-doer and had no right to build the wall, if the Crown, nevertheless, had no right in any capacity to interfere, in either case he is right, and the judgment cannot be supported.

The argument that was chiefly maintained before us turned upon a point which is one by no means unencumbered with doubt and difficulty, and which, therefore, in the view I take of the question, it becomes very satisfactory to me, and I think it will prove the same to your Lordships, not to be called upon imperatively to decide, because, in the first place, it is not the ground upon which the judgment below proceeded, and it is always a satisfactory thing in a Court of Appeal of the last resort to be able to dispose of the question brought by appeal before it on the grounds which were presented to the minds of the Court below. But in the next place, it is satisfactory not to be called on here to dispose of that question, because it is one upon which there is perhaps no precise and distinct decision, and upon which there is some little conflict of authority. The conflict of authority to which I shall presently allude is chiefly in the learned and authoritative treatise, *De Jure Maris*, of that most learned Judge, Lord Hale, the second part of which, perhaps, is more frequently referred to than the first or the third, I mean that called *De Portibus Maris*. That is a posthumous treatise, but it is of high authority. Its authority cannot be impeached, and its authority must not be understood, in any way, to be doubted by us either as to its being Lord Hale's, which the profession and Parliament, in which it has been frequently cited in debates, as well as before courts of law, have never doubted (I state that because it was disputed at the bar); nor, secondly, can we dispute the high authority of that work of Lord Hale's, from its own intrinsic merits and from the venerable authority of the author.

It is not denied that the Crown has certain rights with respect to the sea-shore, and to the sea between high and low water-mark. But on looking over the judgment below, from one

or two expressions of the learned Judge, there seems to be some little colour for believing that another point had been ventilated though not much relied upon, nor distinctly put forward in the Court below. It is this. With respect to high spring-tides, that is to say, the equinoctial spring-tides, which occur twice in the year, at the spring and the fall, it is not contended that the Crown has a right to claim up to those tides; but the dispute between the parties is, whether the Crown is not also precluded from claiming up to the ordinary spring-tides, which would reduce the claim of the Crown to land flowed over by the ordinary tides. That is the question; and upon that there is considerable discrepancy between two passages, one in the 12th page and the other in the 26th page of Mr. Hargrave's edition of Lord Hale's work. It is particularly as to the third head of the three into which the subject matter of the 25th and 26th pages is divided, that there is some little discrepancy, but which, perhaps, is not impossible to be reconciled. The passage in page 12 gives the authority of Lord Hale clearly against the Appellant; that there is no doubt about. That would mean, applying to it a reasonable rule of construction, ordinary spring-tides, though the word "ordinary" is not used. But I do not think it is quite impossible to reconcile that with the 26th page, because, in the second of the three heads, Lord Hale says, "it "is the opinion of persons;" and it is possible that that may have been the prevailing notion in his mind during the third as well as the second head. However, the third, I do not deny, apparently makes for the Appellant, and is in some apparent conflict with the passage in page 12. It is therefore very satisfactory to me that I do not see an absolute necessity for us to dispose of that question.

I said before to your Lordships, that this is equally satisfactory on the other ground which I first stated, namely, that the Court below do not appear to have disposed of that question. I find, however, which I had not observed so much at first, that

when I spell more minutely the elaborate judgment of the Lord Justice Clerk, he does refer a little to that point, and Lord Cockburn a little also, but not so much. He says, "I hold "certainly the right of property to be solely in the Crown." I do not think he goes so far as to say that he means to decide the point respecting spring or ordinary tides; because he may mean, where he speaks of "property in the Crown," that the Crown is entitled in respect of a proprietary right. I think that is the meaning which his words may probably bear. It is very certain that he does not rest his judgment upon that ground. For he says, "But even if the property in the shore "passes to the proprietor of the lands, and without special "grant, still the right in the Crown is a right over and in the "property of some sort or kind which makes the Crown a sort "of joint proprietor to the extent that the rights of neither are "to be defeated nor to clash." I do not quite comprehend that. I do not comprehend the sense. "I have no doubt, however, "in further holding, that one of the public uses, to protect "which the Crown has either a right of property in or of "guardianship over the shore, is the common use of the shore "by the subjects." There I go entirely along with him.

Lord Moncrieff, as usual, distinguishes himself by the great clearness with which he gives his opinion, and here he takes exactly the same ground which I do upon the subject.

Now I have to state, with respect to Mr. Smith, that I have no doubt whatever that Mr. Smith here is a wrong-doer. Mr. Smith has shown no use whatever of this land; Mr. Smith has shown no several exclusive possession of this land. Mr. Smith cannot stand before your Lordships as a party who by possession has ever shown that he has any right to encroach. He produces, in proof of his title, a clause to be found in his charter, but which rather seems to exclude him, for it says, "the ground is bounded upon the north by the sea-shore." The only question, therefore, is, what is the sea-shore? He

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has given us no ground whatever for supposing that by possession or use his ground extends into that part of the sea-shore upon which, it is undeniable, he has built. He has gone down so far as to interrupt the passage to and fro of the Queen's subjects walking along there, of the persons who bathe there in all probability, and of the troops who are reviewed there; for, as Lord Moncrieff observes, it is well known to the inhabitants of the neighbourhood as a place where troops are reviewed, and I myself have been on those sands on military reviews. These are very celebrated sands in that neighbourhood, which have never before been used or attempted to be used in severalty by any of the neighbouring proprietors.

Mr. Smith, therefore, is a wrong-doer; and the remaining question is, has the Crown any right to interfere? I hold that, as against a wrong-doer, the Crown has undoubtedly such a right; very little title will be sufficient as against a wrong-doer, the presumption is against him and in favour of the party challenging his act. If Mr. Smith has a right to build this wall upon the sea-shore, where he has built it, every other owner of that line of houses has exactly the same right. It is enough for the purpose of this suit to say, that for one person so to jut out a wall, or any other tenement, as to oblige the King's subjects to go round or to go into the water, and not to go as they more conveniently and commodiously might nearer the land and less further into the sea, is, of itself, a trespass upon the public rights, and upon the enjoyments of the public. Where the Crown has the property and an easement, or where the Crown, having no property, has an easement alone, it is quite undeniable that this act of Mr. Smith makes him a wrong-doer. It is to the detriment and the damnification of the Queen's subjects, even if no other person follow his example. Other persons, however, past all doubt, would have the same right which Mr. Smith would have, and thereby the whole of that ground would be destroyed, as regards the easement enjoyed by the public,

as much as if it had been inclosed from the beginning, and the public would be so far damnified.

Then, if that be so, whether the Crown has any property in it or not, does not become a necessary question for us to dispose of. We leave, therefore, that more thorny path entirely on one side, and we arrive, by a much smoother and more level path, at a conclusion in support of the judgment below. The ground, indeed, upon which mainly the judgment by the learned Judges is rested, is, that the Crown, as the guardian of the public interests, has the right to interfere on behalf of those interests, just as the Attorney-General might do in this country, by information against a nuisance, and as the Officers of State do in Scotland who exercise that control.

My Lords, it is satisfactory to me to think that it is unnecessary that anything more should be said upon the point disputed before us. Upon these grounds I have to recommend to your Lordships that the judgment of the Court below be affirmed.

LORD CAMPBELL.—My Lords, I am likewise of opinion that the interlocutors appealed from ought to be affirmed. I agree that we are bound to decide the question of law on which issue was joined, "whether assuming, in point of fact, that the "new wall of Mr. Smith extends beyond the high water-mark "in ordinary spring-tides, he is, with reference to the terms of "his titles and the rights of the Crown, entitled to have the wall "maintained in that position?" But we are not bound to decide the general abstract question, whether, by the law of Scotland, the sea-shore belongs to the Crown as high as ordinary spring-tides, or only as high as ordinary neap-tides? We are required to take into consideration "Mr. Smith's titles" and "the rights of the Crown."

Looking to those as they are alleged and admitted on the Record, I am clearly of opinion, without any adjudication of the

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general question, that the new wall was wrongfully erected, and that there ought to be judgment *quod prosternetur*.

Mr. Smith, in erecting it, was evidently a wrong-doer. He does not pretend to say that he had possession of any ground to the north of the old wall, on the contrary, he allows that all the space to the north of the old wall was open to the sea, and that, without any visible boundary, it joined the Porto-Bello sands, on which the public *de facto* have immemorially walked, not only for recreation, but in travelling between Leith and Musselburgh and other adjacent villages. Then examining the Feu Charter from the Marquis of Abercorn to Sir John Stuart, under which Mr. Smith claims, it is clearly a grant of a definite piece of ground "measured off and laid out, not exceed-"ing one-eighth part of an acre," with specified boundaries, and the feuar had as little right to exceed the specified boundary on the north as on the south, the east, or the west.

Such are the titles of Mr. Smith. Now let us see the injury to the public from the new wall which he has erected. This wall is "beyond the high water-mark in ordinary spring-tides." Therefore, as often as the ordinary spring-tides rise to it, the inhabitants of Porto-Bello, Leith, Musselburgh, and the adjacent villages, are cut off, not only from the means of recreation but from the right of way which they have immemorially enjoyed.

Mr. Smith's counsel have contended that he has a right to inclose the sands for the width of thirty feet to the low water-mark; and, on the same principle, he might certainly do so to high water-mark in neap-tides. All the other feuars along the shore might follow his example, and, for large portions of time, the public would be excluded from the sands of Porto-Bello.

The question is, whether the Officers of State representing the Crown have a sufficient interest to apply for an interdict? Mr. Smith objects that the public have made use of these sands only by sufferance, without any legal right, and that the Crown can have no right to the soil, or interest where the new wall is

erected, because it is above the sea-mark of ordinary neap-tides. It is not disputed that the Officers of State are the proper parties to sue, either if the rights of the public have been violated by the erection of the wall, or if an injury is thereby done to the property of the Crown.

Without placing any reliance on notoriety or local knowledge from which the Judges below seemed to think they might almost take judicial notice of the rights of the public on Porto Bello sands, where they probably often invigorate themselves for the discharge of their laborious duties, looking only to the record, it is quite clear that the public are, and have long been, in the enjoyment of these rights. But it has often been held in England, and the doctrine resting on sound principles it must be equally applicable to Scotland, that a party in possession, even with a doubtful title, shall be protected against a wrong-doer by an injunction. Therefore, irrespective of the right of the Crown to the property of the sea-shore, and without touching the question whether the sea-shore extends to the flood-mark of ordinary spring-tides, or only of neap-tides, I am of opinion that, by reason of the easement enjoyed by the public over the *locus in quo* from which they are now excluded, the Officers of State had a right to apply for this interdict, and that it was properly granted in their favour.

Without pronouncing or even hinting at any opinion as to whether the sea-shore extends to the flood mark of ordinary spring-tides, I should have thought that as against this wrong-doer a sufficient case for an interdict had been made out *ratione soli*. Notwithstanding some loose dicta to the contrary, there can be no doubt that by the law of Scotland, as by the law of England, the soil of the sea-shore is presumed to belong to the Crown by virtue of the prerogative, although it may have been alienated, subject to any easements which the public may have over it. Here the sea-shore was considered to go up to the old wall, which bounds these feus from the sands. There is no boundary or division between that old wall and the

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sands at low-water mark, and the same rights appear to have been exercised over the whole of this area. Shall a wrong-doer in such a proceeding be permitted to defend himself by a doubtful construction of a charter granted by the Crown to the Marquis of Abercorn, or by raising the doubtful question, upon which the authority of Hale is contradictory, as to the line of ordinary spring-tides and ordinary neap-tides?

I am of opinion that the Court below did well in granting the interdict, leaving the question undetermined. Could a stranger from Orkney, having no right to a foot of land in the county of Mid-Lothian, by inclosing the space between the old and the new wall, when an interdict against him was applied for by the Officers of State, have defended himself by the doubtful construction of the Crown's charter to the Marquis of Abercorn, or by raising the vexed question respecting flood-tides and neap-tides? Mr. Smith is in no better situation for this purpose, although he is rightful owner of a feu which extends to the old wall and no further.

The interdict being duly granted, the consequence inevitably follows, that the wall which was wrongfully erected shall be prostrated.

Although I have examined the authorities which have been cited at the bar, I studiously abstain from giving any opinion as to the evidence, either by grant or by enjoyment, which is required to show that the sea-shore, which *prima facie* belongs to the Crown, has become vested in a subject; but I may venture to say that, whatever may be the effect of the grant of a barony described to be upon the sea-shore, there is no foundation in law for the position, that the simple grant of a piece of land will pass the sea-shore by which it happens to be bounded. For these reasons I concur with my noble and learned friend in the opinion that these interlocutors should be affirmed, with costs.

[*Sir Fitzroy Kelly.*—With great submission, your Lordships

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will recollect that this is a case by the Crown or by the Officers of State. No costs were given below.

Mr. Bethell.—If your Lordships will hear me upon the point, I shall satisfy you in a moment.

Sir Fitzroy Kelly.—That was so in the case of the Commissioners of Woods and Forests against Lord Bute. The same demand was there made, and the same answer was given.

Lord Brougham.—What do you say, Mr. Bethell?

Mr. Bethell.—It is, my Lord, the clearest thing in the world, that whenever the Crown sues for a public object it has costs.

Lord Brougham.—Were there costs given in the Court below?

Sir Fitzroy Kelly.—No, my Lord.

Mr. Bethell.—I do not know how that is.

Sir Fitzroy Kelly.—You say you do not know, but if you look to the judgment you will find it.

Mr. Bethell.—I apprehend the rule is indisputably this. It is the rule that your Lordships has been familiar with for years, that whenever the Crown sues for a public purpose and on behalf of a public right, the Crown has costs. Witness what is done in the Court of Chancery every day, where the Attorney-General sues in respect of charities, which is a mere suit by the Crown for a public right; the Crown has costs. If this had been a case of perpresture ——

Lord Brougham.—Where the Crown sues by a relator of course it has costs; but suppose there is no relator, are costs given?

Mr. Bethell.—My Lord, the Attorney-General has his costs every day.

Lord Brougham.—Though there is no relator?

Mr. Bethell.—Yes; though there is no relator, and where the Attorney-General is a Defendant.

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Lord Brougham.—I never heard of the Crown in any case, except where there were relators, either getting costs or paying costs. Would the Crown have paid Mr. Smith his costs here if the Crown had been unsuccessful? for it must be mutual. It would be the hardest thing in the world upon a party, if the Crown got costs if it were successful, and paid no costs if it were defeated. Suppose there is a decision in the Rolls or before one of the many hundred Vice-Chancellors with which we are blessed. Suppose there is a decision before any of that large judicial body against the Crown, and the Crown appeals to the Lord Chancellor, and the Crown is defeated in the appeal, would the Crown's costs be awarded by the Lord Chancellor in a decree affirming the decison of the Court below? I am sure I never heard of such a case.

Mr. Bethell.—Costs personally against the Crown are quite out of the question.

Lord Brougham.—I am talking of a suit of the Crown upon a charity, where the Crown files an information without a relator. Where there is a relator the relator pays the costs, and that in point of fact is the use of a relator. I never understood it otherwise than that you had a relator to enable the Crown to pay costs and to get costs. But suppose there is no relator, and that the Court of Chancery reverses the decision of the Vice-Chancellor upon a charity suit, would the Crown have to pay the costs of the party appealing?

Mr. Bethell.—That, my Lord, is very easily answered. Your Lordship knows very well that where the Crown has a decision in the Court below and that is reversed in the Court above, there can be no costs given. The answer in that case is a simple one.

Lord Brougham.—Suppose the decision is against the Crown below, and the Crown appeals and brings the party which it has charged with a breach of trust before me as Chancellor in the Court of Chancery, can I give costs against the Crown when I affirm the Vice-Chancellor's decision?

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Mr. Bethell.—Certainly not, my Lord.

Lord Brougham.—Could anything be more hard than that the Crown should never pay costs, but should always get them?

Mr. Bethell.—The best way sometimes, if your Lordship will forgive me, to answer one question is by proposing another.

Lord Brougham.—I should say that that is the very worst way.

Mr. Bethell.—It is a very approved mode; and I will answer your Lordship's question, if your Lordship will permit, with the greatest humility, by asking you this. Suppose a subject has a conflict with the Crown, and the Crown has a judgment in its favour, and that the subject brings the Crown first to the Lord Chancellor and then to this House, upon an unfounded groundless appeal, is the public, through the medium of the Crown, to pay the costs of that groundless appeal? This very point was discussed the other day, when I took the liberty of using the arguments which your Lordship has just urged, before his Lordship the Master of the Rolls in a precisely parallel case, The Attorney-General against The Corporation of London. There, the Attorney-General, on behalf of the Crown, was contending that the Corporation of London was not entitled to the soil of the River Thames between high and lower-water mark (it is this very case), and the Master of the Rolls undoubtedly decided there, that the Corporation would be liable to pay the costs of the Crown. Although, my Lords, when I succeed, as I anticipate doing ——

Lord Brougham.—Was there a relator there?

Mr. Bethell.—No, my Lord; the Attorney-General is suing in his own name. When I succeed, as I anticipate doing, in disposing of the Attorney-General's information, I am afraid that I shall look to my learned friend, Sir John Jervis, in vain to get the costs of the Corporation of London.

Lord Brougham.—We will look into it.

Lord Campbell.—You have put a case which is very near this, but there may be one still nearer. Suppose the Attorney-

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General files an information in respect of the violation of a public right of way, and then applies for an injunction, how would the costs be dealt with there?

Mr. Bethell.—I understand the rule in the Court of Chancery to be, that if the Crown sues for a public purpose, the Crown has a right to its costs. If the Crown sues in respect of its private property, it neither pays nor receives costs. That the Crown can never pay costs is perfectly clear; but it does not follow, that if the Crown chooses to sue on behalf of the public without a relator, it may not receive costs.

Lord Brougham.—We will look into it.

Lord Campbell.—We shall abide by the rule, whatever it may be.

Lord Brougham.—I only know that in this House we have never given costs under such circumstances, during my time, and it is now eighteen years since I entered it.

Sir Fitzroy Kelly.—This demand, my Lords, is perfectly unprecedented; it is unsupported by precedent or authority.

Lord Brougham.—Just attend to the case put by Mr. Bethell. He says the Master of the Rolls gave costs to the Crown the other day.

Sir Fitzroy Kelly.—The Master of the Rolls, my Lord, has not given costs. All that the Master of the Rolls has done has been to express an opinion in an interlocutory proceeding which has never been brought to judgment, and in which of course there has been no opportunity of taking the opinion of a Court of Review.

Lord Brougham.—The Attorney-General is here in person; what does he say?

Mr. Bethell.—He will I am sure support what I state.

Lord Brougham.—What do you say, Mr. Attorney-General?

Mr. Attorney-General.—My Lord, I know that in the case of the city of London the gentleman who appeared for me, Mr. Turner, applied to the Master of the Rolls for costs. His

Lordship stated that the Corporation would be liable to costs, and that he would take into consideration whether he would enforce payment, and we waived them.

Lord Brougham.—Of course nothing is decided. I will speak to the Master of the Rolls about it.

Mr. Attorney-General.—There is a case expressly upon this point decided in the House of Lords. I have seen it over and over again in manuscript at the office of Woods and Forests. It is the Officers of State for Scotland against some one whose name I forget. Mr. Gardiner has furnished it to me over and over again, and I have cited it in the Queen's Bench.

Sir Fitzroy Kelly.—I will mention two cases to your Lordships upon which there can be no doubt entertained.

Lord Brougham.—Let me remind you of one thing. If you produce a case where we did not give costs against the appealing party, that would not prove anything unless the right came in question; but a case in which we have given costs on the other side is fatal. It is decisive.

Mr. Attorney-General.—In the case to which I refer the question was discussed, and the Court decided that it would not give costs.

Lord Chancellor.—Was it that they could not or would not?

Mr. Attorney-General.—That they would not; that they would follow the practice of the Court below.

Sir Fitzroy Kelly.—I will merely mention the cases to which I refer. I do not want to argue them. The cases are, The Lord Advocate of Scotland against Lord Dunglass, which is in 1st Bell's *Appeal Cases*, page 93. There it was held, that "the Lord Advocate suing on behalf of the Crown, or of any officers in whom the revenue of the Crown is vested, is not liable for the costs of the action, whether competently or uncompetently brought in its form or otherwise. The Lord Advocate suing on behalf of the Crown, or of officers in whom the revenue of the

Crown is vested, is not bound to enter into recognizances. Where the liability of the Crown for costs was in dispute the competency of an appeal on that subject was sustained." Then the other authority is the same case upon appeal, Lord Dunglass against the Officers of State for Scotland,—"The grant of an "office or the grant of a royal forest," and so on. Then this point is decided: "Query, Whether the Crown or the Re- "spondent has a right to reply?" In that case I do not know whether that point appears. But my learned friend, Mr. Anderson, says that in that case the costs were asked for.

Mr. Bethell.—If it be private property of the Crown, or pertaining to the Crown's revenue, the rule is clear.

Lord Brougham.—The revenue is another case; you except that case from your argument.

Mr. Bethell.—Quite so.

Lord Brougham.—You suppose the Crown not to be suing as the owner of the revenue, but as the guardian of a public right. The case of a charity would not exactly apply, but the case of the city of London before the Master of the Rolls is on all fours with the present. It is just this case.

Sir Fitzroy Kelly.—We say there is no distinction at all between those cases and the present; but we leave it in your Lordships' hands.

Lord Brougham.—We will speak to the Master of the Rolls about it.

Sir Fitzroy Kelly.—If your Lordship pleases.

Lord Brougham.—And we will look into the precedents in this House also.

Lord Campbell.—We will abide by the rule, whatever it may be. The more convenient rule would be, that the Crown should both pay and receive costs.

Lord Brougham.—Quite so. Sir Samuel Romilly brought in a Bill to that effect.]

On a future day, viz., the 31st July, 1849, Lord Brougham

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gave the judgment of the House upon the question of costs in these terms: We have considered this case of Smith and the officers of State, and we are of opinion that there can be no costs given.

It is ordered and adjudged by, &c., that the said Petition and Appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of be, and the same is hereby affirmed.

SPOTTISWOODE and ROBERTSON—RICHARDSON, CONNELL, and LOCH.

[HEARD 23*rd*—JUDGMENT 27*th July*, 1849.]

The Reverend the MINISTERS of the CITY of EDINBURGH, *Appellants.*

The LORD PROVOST, MAGISTRATES, and TOWN COUNCIL of the said City, *Respondents.*

Trust—Corporation—Burgh Royal—A Parliamentary power given to the Magistrates and Council of a burgh to appoint persons to collect a tax for payment of the stipends of the Ministers of the burgh, and to apply it in payment accordingly, will not make the common good of the burgh liable for default by the Magistrates and Council in the execution of the power.

AN Act of the Privy Council of Scotland in regard to the maintenance of the clergy of the burgh of Edinburgh, bearing date the 18th of March, 1634, to which Parliament gave the force of an Act of Parliament, upon a recital that "as there is "nothing more consonant to equitie and reason than that all "such persons that dailie enjoy in plentie that blessing of the "word of God, and heares the same preached, and does "participat the benefit of the Clergy, should contribute to the "maintenance of the Ministri in these places where they "take the foresaid benifit. And Our Soverand Lord and "Estates of this present Parliament, understanding that ever "since the Reformation, the whole inhabitants of the said burgh "of Edinburgh has enjoyed the forsaid benifits and blessings, "and the common good of the Town, which has been given to "them for maintenance of policie, has been that way employed "through the inlaick of other sufficient means for entertaining

"the Ministrie of the said burgh, For remeid whereof, and to "the end that these who serve at the altar may be entertained "aff the altar, and the said common good may be rightly "applied to the use whereunto the same has been appointed," ordained that the sum of 12,000 marks should be uplifted yearly of the inhabitants of the burgh, and ordained "the "Provost, Baillies, and Counsell of the Burgh," "to appoint "and make choice of four sworn men of ilk parish within the "said burgh," to make a valuation of the houses within the burgh, according to their yearly rent, "and because that new "houses may be built, and other houses may likewise come to "dacay and ruine, so that the mailles thereof may be omitted "or defective, and the inhabitants of the said new houses free "of the foresaid burden: Therefore, ordain the Provost, Baillies, "and Counsell of the said burgh, ilk year, or ilk twa years, "as they sall think expedient, to appoint new stentors and "valuers for valuing of the said house maills," and declared the inhabitants to be liable to contribute according to the rolls to be made by the valuators, "and in case of refusal of any "person, ordains the said Provost and Baillies to direct their "officers to poind their goods, or ward their persons for the "same, without any farther sentence or process at law."

An Act of the Convention Parliament of the 2nd of March, 1649, proceeding upon this recital, "having considered the "petition of the Toune of Edinburgh ffor approving and "ratefeing the Act of the Committee of Estates for ane yearlie "imposition upon the house maills and uthers for the main-"tenance of the sex Ministers, Togedder with the report of "the Committee of Bills thairanent, and being verie sensible "of the constant affection of the guid Towne of Edinburgh to "religion, and their eminent and exemplarie zeal and desire "for provyding and establishing a sufficient number of guid, "able, and well qualified ministers for their several kirks: and "taking also to their serious consideration the vast charges

"they have been at in building of thair kirks and uther "publick works, In advancing great soumes of money for "the use of the publick Towards the maintenance of the caus "and the promoting the Reformation, and the great loss they "have sustained from thair great troubles and distractions, and "being desirous to encourage and enable thame, towards the "maintaining and provyding of a sufficient number of able and "well qualified Ministers;" after increasing the aggregate sum which might be levied for the maintenance of the clergy of Edinburgh, contained this enactment in regard to the appointment of the valuators or stentmasters: "and because it is not "intendit that any prejudice or preparative should be hereupon "inferred to the privileges and Liberties of the College of "Justice, or that any member thairof should be unequally "burdened, Thairfore, for preserving the Lords of Secret "Counsell and Sessione, and the haill members of the said "College of Justice freed from any prejudice to thaimselves or "their privileges, It is ordained that the said Annuity and "Imposition shall be laid upon all the inhabitants, tennentis, "and possessors of the houses, chambers, buiths, and uthers "aforesaid, within the said burgh, after exact survey by four "sworne men in every paroche, Who shall survey and value the "house maills aforesaid, Quhairof three shall be citizens, To be "chosen and sworne be the Toune Counsell, and the fourt shall "be nominate, choysin, and sworn be the College of Justice, "or such as they shall appoint."

An Act of Parliament of the 6th of June, 1661, recited, "Forasmeikle as the city of Edinburgh being the cheiff and "principall citie of this kingdome, whither vpon occasion of "sitting of Parliaments for the most parte, the Secreit Council "and Session and other great Judicatories within the same, "The Nobility Gentrie and people of the kingdome of all "sorts and from all the corners of the cuntrie doe daylie "repair and resorte; Not only the inhabitants of the said

" burgh bot the whole kingdome is concerned that able and " faithful Ministers of parts and abilities suteable to the " eminency of the place & weight of the charge should serve " in the said city And for their encouragement competent " stipends should be satled and provyded for them And seing " the teinds rents and others belonging to the citie for the vse " and mantenance of the Ministers of the said citie Ar far " short and not proportionable nor sufficient for such ane " number of Ministers as is necessary ther; And the said toun " haveing been at vast charges for building of churches and " publict works vpon that & other occasions The Comon good " and Patrimonie therof is exhausted and overburthened and " vpon the considerations foresaid the inhabitants of the said " burgh who hes the comfort and benefite of the preaching of " the Gospell and ministerie within the same be the space of " diverse yeers vntil this tyme hes been in vse to pay for the " provision and stipend of sex of the Ministers of the said " burgh a yeerly imposition & anuitie at the rate and proportion " of sex merks for & effeirand to each hundreth merks of the " maills & rents of all the duelling houses chalmers booths " cellers and all other houses heigh and laigh inhabited within " the said toun And his Maiestie and Estates of Parliament " Considering that ther is not a more easie and effectuall way " for provyding and paying the stipends of the saids sex " ministers then in maner and be the imposition forsaid And " that it is iust and necessar that the same should be authorized " & satled be ane perpetuall law in all tyme comeing." After this recital the act regulated the proportion of the assessment which should be paid by the inhabitants severally, and declared that the assessment should be collected " by the deacons of the " kirks or by a collector to be appointed for that purpose by " the magistrates and council of the said burgh in their option, " and as they shall think fit and expedient for the time:" and that the assessment should be laid upon the inhabitants after

survey by four sworn men, "whereof two shall be citizens to "be chosen and sworn by the town council, and other two "shall be nominat chosen and sworn by the College of Justice "or such as they shall appoint. And if the College of Justice "refuse or delay being required by the magistrates and council "of Edinburgh," in that case the remanent of those persons chosen and sworn by the town council shall have power to go on in the said employment, and act by themselves without the members of the College of Justice. The statute then "ordaines "all persons who are resting and have not made payment of "their Quota & proportion of the said anuitie or any parte "thairof since the same wes in vse to be payed To mak pay-"ment of the same of all yeers & termes bygone since the "tyme forsaid Requireing & Commanding the Deacons of the "kirk and Collectors ane or mae to be appointed be the "Magistrats & Councill of the said burgh To collect gather & "vplift the forsaid anuitie yet resting of all yeers & termes "bygone and in tyme comeing And that the Magistrats of the "said burgh sie this whole act and ordinance obayed and put to "dew execution according to the tenor thairof, And to doe all "things necessary for that effect And letters of horneing, and "all other executorialls necessary Are ordained to be direct "vpon this act in forme as effeirs."

The Acts 7 Geo. III, cap. 27, 25 Geo. III, cap. 28, and 26 Geo. III, cap. 113, which severally extended the royalty of Edinburgh, enacted that "the magistrates and town council" should have power to appoint stentmasters to levy from the possessors of houses within the extended district, "in the same "way and manner as the same are now levied within the present "royalty."

The Act 49 Geo. III, cap. 21, which further extended the royalty of Edinburgh, repealed the power to appoint stent-masters given by the different statutes which have been mentioned, and contained this further enactment:—"And to prevent

" all doubt respecting the legality of levying and applying to " this and similar purposes the annuity of six pounds per " centum on the rents of houses, shops, booths, cellars, and " premises, which the said Lord Provost, Magistrates, and " Council have been in use to levy within the city, along with " the other funds or revenues which are applicable, either in " whole or in part, to the payment of minister's stipends, be it " enacted and declared, That the said Lord Provost, Magis- " trates, and Council, and their successors in office, shall be, " and they are hereby authorized and empowered not only to " levy as they have hitherto been in use to levy, the said " annuity of six per centum upon the yearly rents of all inha- " bited houses, shops, booths, cellars, and premises within the " said city and royalty thereof, whether extended by the said " recited Acts or by this Act, and to apply the same as they " have been hitherto in use to apply it, along with the aforesaid " other funds or revenues, as far as those other funds or revenues " are so applicable, for the payment of the stipends of all the " ministers of the present churches of the said city and royalty; " but also to apply an equal proportion of the said annuity in " common with the aforesaid other funds or revenues, in so far " as these other funds or revenues are so applicable, for the " payment of the stipend or stipends of such minister or ministers " as may be appointed to the churches which are required to be " built under the authority of this Act, in manner before men- " tioned."

In October, 1838, Dr. George Baird and the other ministers of Edinburgh raised a summons against the Lord Provost, Magistrates, and Town Council, which, after reciting the enactments of the different statutes above mentioned, set forth that previous to the year 1818, stentmasters were regularly appointed by the Magistrates and Town Council in terms of the statutes, but that in that year a practice was commenced which continued till the year 1836, according to which, in violation of the

statutes, the Magistrates, as Commissioners of Supply, appointed the stentmasters without the concurrence of the Town Council. That in the year 1836 doubts were raised as to the legality of this practice of appointment, in consequence of which the collection of all existing arrears of the assessment for the ministers was thenceforth discontinued. That the illegality of the mode of appointment of the stentmasters was ascertained in the year 1837, in the course of a suspension of a charge against one of the inhabitants for payment of his proportion of the assessment. "That the said irregularities in the appointment of "these public offices were produced by the culpable neglect or "omission of the Magistrates and Council to perform the "statutory duty committed to them by the above-recited "statutes; and by their deviation from the course prescribed "by the said statutes, the said Magistrates and Council, in their "corporate capacity, are liable for all the consequence of their "said culpable neglect or omission, and their violation of the "provisions of the said statutes." And after stating the bankruptcy of the city of Edinburgh in the month of June, 1833, and a claim made in the bankruptcy for the arrears of the assessment previous to Whitsunday, 1833; the summons further set forth, that subsequent to June 1833, the irregularity in the appointment of the stentmasters continued till 1836, and in consequence all arrears of the assessment subsequent to June 1833, had become irrecoverable; that the arrears for this period amounted to 4908*l.* 4*s.* 9*d.*, and that the pursuers were entitled to recover this sum from the defenders "in their cor-"porate capacity and in satisfaction of the claim to attach all "and every estate or fund, which now pertains and belongs or "may hereafter pertain and belong to the defenders as a cor-"poration, that the defenders are bound out of their alienable "revenues and property to content and pay to the pursuers the "said sum of 4908*l.* 4*s.* 9*d.*" The summons, therefore, concluded that the defenders should be ordained to make payment to the

pursuers, "out of the free alienable revenues of the city," of the said sum with interest.

The Respondents, after pleading five dilatory pleas to this action, further pleaded the following defences upon the merits:

"6. But, holding it competent and expedient in this process "to enter upon the question, how far the objection that has been "taken to the validity of the annuity assessment is or is not "well founded, it is maintained that it is not well founded; and "that, on the contrary, the nomination of stentmasters com- "plained against, was, in its substance, and with reference "to the circumstances under which it took place, legal and "valid.

"7. At all events, even if it was otherwise, the defenders, "acting in *optima fide* and gratuitously in the matter, and "having followed the precise course which a previous practice "of nearly twenty years had established, and having no direc- "tions or instructions whatever to the contrary from the pur- "suers, were not liable in damage.

"8. Moreover, even if a claim for damage was maintainable "at all, it is not maintainable as a claim against the corporation "or the corporate estate.

"9. More especially, the particular conclusions levelled "against the specific fund of 8000*l.* cannot be maintained, in "respect of the enactments of 1 and 2 Victoria, as well as upon "other and more general grounds.

"10. Generally, and in the whole matter, the defenders are "not resting-owing the debt libelled, or any part thereof."

After a record had been prepared the cause was advised by the Lord Ordinary upon cases for the parties, when his Lordship "sustained the 7th, 8th, and 10th defences as sufficient to "elide the action, and therefore assoilzied the defenders *sim-* "*pliciter*." To this interlocutor his Lordship subjoined the following note:

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

"The Lord Ordinary, after repeated and most anxious consideration of the important questions stirred between the parties, has come at last to be satisfied that the action cannot be maintained.

"1. He is of opinion that the trust for behoof of the ministers, created by the statute, is not a trust in which *the general community or Corporation of the burgh* can be considered as the trustee. In this view the analogy afforded by *Pearson of Balmadie's case* (Dict. 13,098) is important; the taxation here, as there, 'not being imposed upon the *town's* '*common good*, but upon the *inhabitants severally*, for their 'money, and the magistrates not being countable *to the town* 'for the taxation of money.'

"It is very true that the statute appoints, as trustees, the official persons constituting the *Magistrates and Council*. But from this it does not necessarily follow that these parties *represent the community* in administering the *trust* so conferred. If a private party were to mortify certain lands for behoof of the clergy, and vest the administration of this estate in the *Magistrates and Council*, it is clear that the latter would not represent *the community* in the discharge of their proper trust functions, and, consequently, that *the community* would not be answerable for the manner in which they should either execute or fail to execute their office. Does it make any difference that the trust is created, not by a private party, but by an act of the Legislature? In point of principle the Lord Ordinary cannot think it does. The Magistrates and Council represent, and are entitled to bind *the community*, only in what concerns the administration of the *common good*, which is the *estate of the community*. But they do not represent the community in the administration of such a tax as the *Annuity Tax*,—which forms *no part of the common good*, and affects *no direct interest of the community*, in that ordinary relation in which the Magistrates and Council stand towards

" them as their administrators,—but which, on the contrary, " wholly and exclusively belongs to the *Ministers*, and as such " falls to be administered in the sole and undivided right, not " not less than for the sole and undivided behoof of these same " ministers. In such a case, the Magistrates and Council " properly are administrators for, and represent the *ministers* " only. They are not administrators for, nor do they represent " the *general community or corporation of the burgh.*

" On this ground, without going farther, the Lord Ordinary " is prepared to adopt the rule laid down in *Balmadie's case*, " that the community or corporation is 'not liable for their " 'magistrates, who had not this power by their office (*i.e., not* " '*apart from the statute*, and as a natural adjunct and neces- " 'sary condition *of their office*) but by *the commission of* " '*Parliament therefor.*'

" And, indeed, when the whole frame and structure of the " statute, as regards the duties thereby imposed, are considered, " the conclusion thus arrived at comes out in the clearest light. " For, by the terms of the statute, it is *not solely* upon the " Magistrates and Council that the duty of appointing stent- " masters is laid. It is laid upon them *in combination with the* " *College of Justice.* And though no doubt from some cause " foreign to the construction and intendment of the statute, the " College of Justice has come practically to be dropped out of " the combined trust, which the Legislature had it thus *in* " *animo* to create; still that which is but an accident in the case " does not and cannot affect the character of the trust itself, as " that trust was originally constituted on the face and according " to the conception of the statute. Now, just suppose that the " College of Justice, instead of no longer taking a part, had been " from the outset, and was still, in active co-operation with the " Magistrates and Council as to this matter of the stent-masters; " and it is asked, would it be possible to *separate* that mere " *portion* of the duty which fell to the *Magistrates and Council,*

" as if constituted by itself alone a *distinct trust* to be adminis-
" tered for the corporation of the burgh? On the contrary,
" is it not clear that the *statutory trust* implies the existence
" and combined operation of a complex and heterogeneous
" body, all the several parts of which are, in their respective
" places, to act for behoof, not of the burgh, but of the ministers
" as sole beneficiaries. Plainly, therefore, in this its first and
" original combination, the statutory trust was not a trust of
" which the burgh as *a corporation* (seeing the burgh could
" never be represented by any body whereof the College of
" Justice formed a part), was to be regarded as administrator.
" But if so, how is it possible that the mere disappearance of the
" College of Justice out of the combination should operate a
" change in this respect? If the burgh, *as a corporation*, was
" not administrator of the trust when the Town Council and the
" College of Justice were acting as they were intended to act, *in*
" *conjunction*, it surely is not more to be considered so, now that
" in carrying the very same trust into execution, the Council
" has, by an unlooked-for accident, got to perform both its own
" proper functions, and those of its co-trustee the College of
" Justice.

" This view clears the question of all difficulty which might
" otherwise seem to arise from an argument which has been
" rested on the supposed analogy of such cases as *Innes*,
" *6th February*, 1798, Dict. 13,189, and those others referred to
" by the pursuers, where the corporations and common good of
" burghs have been subjected for *the escape of prisoners* from
" the burgh jails. For in all such cases the radical obligation
" lay upon the corporation itself, and the Magistrates and
" Council, &c., merely acted as the corporation's representatives
" and administrators in the special matter. Of course, if a cor-
" porate body, in a proper concern of its own, be compelled to
" use the *agency of its office-bearers*, it must, by familiar appli-
" cation of the maxim, *qui facit per alium facit per se*, be

" responsible for the actings of these office-bearers within their " delegated province. The distinction here is, that the statute " imposes no duty, and consequently no obligation on the *cor-* " *poration*, that the Magistrates and Council consequently do " not act by *delegated authority from*, or at all *as representing the* " *corporation*; and therefore, that the whole ground and basis of " liability *as against the corporation*, which existed in the cases " referred to, are here awanting.

" In truth, if there be an argument from analogy at all " afforded by the cases in question, it would seem to fix the " Magistrates and Council as representatives and administrators " not of the community but of the *Ministers themselves*. For " the Ministers being sole beneficiaries under the statutory trust, " and it being for their exclusive behoof that that trust is " operative, it follows, that on the same principle on which the " Magistrates and Council bind the corporation, in all matters " in which the corporation is their constituent, they must " equally bind the Ministers in matters connected with the " annuity, in which the proper constituent is the latter body. " For example, if in enforcing payment by diligence from any " of the tax-payers, an accidental error or irregularity were to " take place, whereby the diligence was rendered illegal, is it " possible to maintain that the damage thence arising should be " thrown on the common good, instead of upon the annuity " fund, which it was the object of the diligence, as a diligence " for behoof of the Ministers, and not at all of the community, " to enforce?

" 2. In the next place, even though the community (as " acting through the medium of the Magistrates and Council) " were to be regarded as the trustees, the Lord Ordinary would " still be of opinion, that in the admitted, or at least undisputed " circumstances of the case, there is no ground for subjecting " them *in damages*.

" To bring out such a result, a case would require to be

" made against them, of such a gross malversation as would be " sufficient in the case of *an ordinary trust* to subject the indi- " vidual trustees in *personal liability*.

" The Lord Ordinary does not think it reasonable to visit " the blunder that has here been the ground of action, with such " extreme severity. The character of the trust, taking it in all " its bearings, he holds substantially to have been as regards the " proper corporation of the burgh, and the proper corporate " officers and estate, of gratuitous execution, and, as such, to " fall within the category, in reference to which it is laid down " by Erskine (3. 1. 21.), that 'where only one of the parties is " 'benefited by it,' the other 'is liable only *de dolo, vel lata* " '*culpa*, *i. e.*, for dole or for gross omissions, which the law " 'construes to be dole:' or, as he elsewhere (3. 3. 36.) expresses " it, 'only for actual intromissions, or for such diligence as he " 'employs in his own affairs.'

" Now, tried by this standard, it is clear, in the first place, " that there was here *no dole* in the proceeding of the Magis- " trates and Council. In the next place, as it appears to the " Lord Ordinary, neither was there that *crassa negligentia quæ* " *æquiparatur dolo*. For how stands the facts? 1, The *statute* " lays down no precise rule as to the nomination of stent- " masters; and, 2, In the absence of any such, both parties are " agreed that *usage* has fixed—not that there shall be an *annual* " election to the effect of renewing *de anno in annum*, the entire " body, or even any stated portion of their number; but, on the " contrary, that a stent-master, once elected, continues so in- " definitely, and that it is only when a vacancy happens to " occur, that it becomes necessary, in the individual case, to take " steps for filling up the blank. Now, keeping this in view, " observe—3, That, when subsequent to the city's bankruptcy " (and the present question does not carry back farther), the " Magistrates and Council of 1833 came to have charge, they " found the *roll of stent-masters complete*. There was no

" *vacancy* which called for any active interference on their part, " or which even had the smallest tendency to turn their attention, " directly or indirectly, to the matter. The existing stent- " masters, besides, were *in the full and unchallenged exercise of* " *their office*;—not a whisper of complaint or objection either " as regards the regularity of their appointment, or their com- " petency to discharge their duties, having been breathed from " any quarter. Add to all this, 4, That the system of nomina- " tion, such as it was, had itself stood unchallenged and uninter- " rupted from 1818 downwards,—*a period of fifteen years*,— " and 5, That the same system had been operative during all " this time, in regard to the stenting of *cess*, and the assessment " of *poor's rates*, not less than in regard to the Ministers' " *annuity*.

" The Lord Ordinary cannot conceive a case more thoroughly " exclusive of either dole or gross negligence, or rather a case, " on the contrary, more thoroughly conclusive of the most " perfect *bonâ fides* on the part of the Magistrates and Council, " than is here presented. It appears to him that even the " *acquiescence* of the Ministers in the system that had been in " action for so long a period is itself a sufficient excuse (if such " were wanted) for the Council's not interfering to upset the " machinery which had been handed over to themselves as a " thing already perfect, and answering all its proper purposes. " At all events, if the Ministers deemed a change essential, it was " surely their business—where *no vacancy* had occurred, to call " the Council's own attention to the matter—to intimate that " such was their wish. If the Council, being so put upon their " guard, had refused to comply, that might have raised a very " different kind of question. But they were allowed to go on " without requisition, or even the most distant hint or sug- " gestion of a wish that they should alter the existing course " of procedure. It has been said that the Ministers were them- " selves in ignorance that there was anything wrong, as they

" knew nothing of the Council's proceedings, and had no power " to interfere with anything they did. But were they entitled " to be thus ignorant of what so nearly concerned themselves? " And was it not their duty, as it was undoubtedly their right, " to interpose if they intended to fall back upon the Council " with a claim of damages? The present action shows that the " means of an efficient controul were within their hands. And " so standing the case, the Lord Ordinary cannot regard fifteen " years of tacit acquiescence on their part as a matter so easily " to be got over, as has been attempted in the argument.

" The Lord Ordinary, however, is aware that in 1834 the " Magistrates and Council did fill up *one* vacancy, and, again, in " 1835, other *two*, which had by that time occurred in the list " of stent-masters. But this does not materially affect the " case. For, 1. As the stent-roll is made up by *separate* " survey and valuation '*in every parochin*,' it could only be as " regards those portions of the roll which applied to the parti- " cular parishes wherein these vacancies were filled up, that any " speciality of this kind could touch the argument; and if the " Defenders be right in stating that in these parishes 'there was " ' little arrear of annuity for the years libelled on left unpaid, " ' —indeed scarcely any that would in any circumstances have " ' been recovered,'—the thing could in any view be but of " little consequence. 2. The Lord Ordinary, however, is " rather disposed to refuse effect to the speciality altogether, on " the broad ground that any error committed by the Council, " as regards the vacancies in question, being in conformity with " the unchallenged system of appointment, which they found in " action when they came into action, was not in the circum- " stances, sufficient to lay the ground for *personal liability* (so " far as that expression can be applied to the case of a corpora- " tion), in the shape of a penal claim for damages.

" 3. The Lord Ordinary has not in the preceding observa- " tions rested anything upon the principle recently so well

" illustrated by the decisions both of the House of Lords and " of the Court, as to the liability of such bodies as *road trustees*, " *police commissioners*, &c., though here, too, there is much that " has an adverse bearing on the pursuers' argument. For as, " on the one hand, the pursuers, upon this principle, could not " be subjected personally, or in the annuity fund, as their " peculiar and proper estate, for the consequences of any " illegal proceeding of the Magistrates and Council *as their* " *trustees*, carried through in face of *their statutory powers*; " so, on the other, neither ought the corporation or general " community of the burgh to be subjected *in their proper estate* " *or common good*, which the same Magistrates and Council are " not less bound to administer in a legal and correct manner, " and equally powerless to bind for any proceeding *in breach or* " *excess of their legal powers* as its administrators. In ad- " ministering the common good the Magistrates and Council " are just as much trustees for the corporation or general com- " munity as in administering the annuity they are trustees for " the Ministers. And, of course, this trust-estate must in their " hands, *pari ratione*, be protected from the consequences of " their illegal and unauthorized acts, just as much in the one " case as in the other. In truth, if the pursuers be right in " representing the proceedings of the Council, as proceedings " so deeply tainted by that *crassa negligenti quæ æquiparatur* " *dolo*, the estate of the corporation ought no more to be " involved in the consequences of this dole on the part of their " administrators than the estate of the Ministers. *Culpa tenet* " *suos auctores.*

"The Lord Ordinary is satisfied that under the present " libel the pursuers cannot avail themselves of any special " argument for the liability of the defenders, founded on the " *contract* 1815. The action is wholly made upon a breach of " *the statute.* But, at any rate, the contract was not intended " to enlarge or in anywise alter or affect the fundamental

"ground of liability rested on the statute. It merely repeats "the obligation which the statute itself, as construed by the "judgment of the Court in 1814, had imposed, viz., to account "for the *produce* of the annuity as it shall be levied.

"5. Neither has the Lord Ordinary found it necessary, "according to the view of the case on which the judgment "proceeds, to consider the effect of the decision pronounced "in the Bill Chamber in *Winter's* case. For all the purposes "of the judgment, it may be assumed that that decision would "in its substance have been repeated upon the expede letters. "Indeed were the Lord Ordinary to offer an opinion on the "subject, that opinion, as he is at present advised, would be, "that as regards the mere *charge* under suspension, the decision "must have been so repeated. At the same time it is perhaps "not wholly free from question, whether when the statute says "that of the stent-masters 'two shall be citizens to be chosen "'and sworne be the Town Council, and *other two* shall be "'nominat, chosen, and sworne be the Colledge of Justice, or "'*such as they shall appoint*,'—these words, 'such as they "'shall appoint,' do not properly carry back and apply to the "Council as well as to the College of Justice,—in which case "there might be much to say in support of the appointment, "which was actually made by the Magistrates in the present "case, as being substantially an act of delegated power. Be "this, however, as it may, the Lord Ordinary is certainly not "prepared to hold, merely because there was in such a case as "*Winter's*, no legal warrant for the *summary charge* that was "brought under suspension, that therefore the *annuity tax*, as "imposed by the statute, became, to all intents and *in every* "*shape whatsoever*, unleviable. This is a most important "question, not merely as regards the annuity, but as it may "possibly come to touch both the *cess* and *poor's rate*, and "consequently it would deserve the most deliberate considera- "tion before pronouncing any definite judgment in regard to it.

"At present it is fortunately unnecessary to enter farther into "the subject.

"6. In conclusion, the Lord Ordinary has only farther to "observe, that had he taken a different view of the law of the "case from what he has done, he must have sent the whole "question *before a jury*, as in an ordinary claim of damage. "He has no idea that the pursuers could in any sense be "entitled to a decree, as for a liquidated debt, in terms of the "stent-roll, which they themselves repudiate and totally deny "to rest on any *actus legitimus*. At best, they could only have "such damage as, adopting Lord Kames's distinction between "the cases of debts liquidated and unliquidated, they could "reasonably and fairly qualify *on the whole matter*. But in this "view it is not doubted but that a jury would make all proper "and necessary allowance for such *ordinary deductions* as the "experience of former levies has from time immemorial shown "to be unavoidable.

"The defalcations inseparable from the most favourable "levy of a tax, which falls to be gathered from the whole members "of a large community, presents totally different considerations, "both legal and equitable, in a question of failure of diligence, "from anything that is or can be presented in the case of a "*messenger's* failure to execute as against one single individual "a specific legal writ, or of the liability of *Magistrates* for the "escape from the burgh jail of an individual debtor, with "reference to the one certain specific warrant on which he "stood incarcerated."

The Appellants reclaimed against the Lord Ordinary's interlocutor, and upon advising their reclaiming note the Court appointed the cause to be heard in presence of the whole Judges, and after the hearing requested the Judges of the other division and the permanent Lords Ordinary to give them their opinions whether the interlocutor of the Lord Ordinary ought to be adhered to. Afterwards, on the 28th of May, 1845, in

conformity with the opinions of a majority of seven to six of the consulted Judges, the Court recalled the interlocutor, "in so far as it sustained the seventh defence, *quoad ultra* "adhered to the interlocutor, and refused the desire of the "reclaiming note."

The appeal was taken against the interlocutor of the Lord Ordinary and of the Court.

Mr. Bethell, *Mr. Wortley*, and *Mr. A. McNeill*, for the Appellants. By the agreement between the Crown and the corporation of Edinburgh in 1625, the corporation undertook to pay the Ministers of the burgh a fixed stipend of 1200 merks, which, like all other payments undertaken by the corporation, was to be provided out of the common good of the burgh. The Act of 1634, followed as it was by the Act of the Convention Parliament of 1649 and the Act of 1661, came to the relief of the common good by authorizing the levying of a tax upon the inhabitants of the burgh; but that change of the source from which the payment was to be made, in no degree impaired the force of the obligation to pay. The history of the matter, therefore, shews that the maintenance of the clergy was part of the duty of the corporation. Accordingly power is given to the corporation to appoint the persons who are to levy the tax, and to "apply" the tax, when so levied, as they had been in use to apply their other funds for payment of the stipends.

[*Lord Brougham.*—You do not mean to say, that at common law every corporation is bound out of its common good, to maintain in the first instance the churches of the town. All you mean to say is, that under the special circumstances here, that liability exists in the city of Edinburgh; that the statutes create that liability?]

That is so. In consequence of certain powers given to the corporation it incurred certain duties. The corporation stood in the situation of trustee, and there has been wilful default in

the discharge of the duties of that office. The seventh plea of the Respondents is the answer given to this, but the Court below has rejected this answer by the alteration it has made upon the interlocutor of the Lord Ordinary. And from the opinions of the Judges it appears to have been held that the relation of trustee and *cestui que* trust did not subsist between the parties; but that assuming it to have subsisted, there was wilful default. The judgment below, therefore, is in truth confined to the competency of the action, directed as it is against the corporation, and is rested upon a distinction between the corporation and its officers; the argument seeming to be that the corporation cannot be sued, but that the magistrates may be sued in another capacity than their official, but this is in defiance of the decision of 1813, in Davidson *v.* Magistrates of Edinburgh.

There the summons was directed against the Provost, Magistrates, and Council of the burgh, and its competency was sustained by the Court in a judgment which found that the Ministers of Edinburgh have "the sole interest in and exclu-"sive right to the entire produce and benefit of the annuity," and that the defenders were "liable to hold count and reckoning "with the pursuers and their successors for the produce of the "said annuity." To say, therefore, that the present action is not competent, which is what the pleas of the Respondents amount to, is to say that the Appellants have no right to put a question to the party as to the state of the account between them.

[*Lord Campbell.*—This is not an action of account, as that in 1810 was, in which the Court said that all that had been received must be paid over. But it is one for culpable negligence, out of which liability may arise, but no account.]

A bill in Chancery in England would be framed on the model of this summons in the same circumstances, the relation of the parties being that of trustee and *cestui que* trust. The corporation has a duty to perform which they are called upon

to perform, and if they have not the tax ready to pay over, this is through their wilful default, for which the summons seeks to make them answerable. In Pearson *v.* Magistrates of Montrose, *Mor.* 13,098, action was not sustained against a corporation; but there the case rested on a mere contract between the party and the magistrates as individuals, and not as acting in the name and for behoof of the corporation. On the other hand, in Innes *v.* Magistrates of Edinburgh, *Mor.*, 13,189, the corporation funds were held to be answerable for damage sustained by a private party, through the culpable negligence of the magistrates. The doctrine of trust is certainly not, as yet, fully understood in Scotland, but it must be eliminated upon the same principles as it already has been in England.

In Corporation of Colchester *v.* Lowten, 1 *V.* & *Bea.* 246, *Lord Eldon* laid down, that a corporation is, in respect of property not dedicated to any particular charity, liable to be charged for wilful default. If it be ascertained that a corporation is the depositary of a power, then all the liabilities incident to a trust follow against the corporation as against any other trustee, Russell *v.* Men of Devon, 2 *Ter. Rep.*, 667; Mayor of Lynn *v.* Turner, *Cowper*, 86; Henley *v.* Mayor of Lyme Regis, 3 *Moo.* & *Pa.*, 278. There is a statutory relation created between the corporation and the ministers, that the corporation shall execute the power and perform the duty, and the ministers have a clear right to compel, by suit, a due performance of this.

Sir F. Kelly and *Mr. Anderson* for the Respondents.—The Appellants have not dealt with the question whether, assuming the breach of duty which they allege to have been really committed, the common good, by whomsoever the breach may have been created, can be liable for the consequences. At common law the common good of a burgh is not liable for ministers' stipend. Is there, then, anything in the present case to alter this as to Edinburgh? Previous to 1634 an illegal practice had

prevailed of applying part of the common good to the sustentation of the burgh ministers. The Act of 1634 recites this practice, and applies a remedy, by directing the levy of a tax upon the inhabitants. The two subsequent Acts no way vary this than by increasing the amount of the tax. Yet the Appellants seek to have their stipend paid out of the common good, because the council has neglected its duty in the collection of this tax. If this claim were to be sustained by an alteration of the judgment of the Court below, it would be virtually a repeal, *pro tanto*, of the statutes, and a revival of the illegal practice which they were intended to put a period to.

All the cases have, in substance, been attempts to compel compliance with conditions on which property vested in corporations; but it is quite a different thing when no property is vested in the corporation for the special purpose, and it is sought to make the corporate property liable for the defect in duty of the corporate officers. The statutes have expressly appropriated a fund for the purpose, and freed the common good. No action can lie against a corporation if the effect of the judgment in it is that the judgment must be satisfied out of the corporate funds applied by statute to special purposes. Were this otherwise, then, were the corporation to fail in appointing stent-masters for the rates for the poor, &c., the magistrates might, in this way, transfer the liability from the householders to the common good; and so it would depend on the conduct of the corporators, whether the corporate funds should be applied to their legitimate and appropriate purposes, Pearson *v.* Magistrates of Montrose, *Mor.* 13,098; Heriot's Hospital *v.* Ross, 12 *Clark & Fin.* 507; Duncan *v.* Finlater, *Mc L. & Rob.*, 935. If a statute impose a duty on certain individuals of a body it is against them and not against the body that proceedings for breach of the duty must be brought. The Statute, 1661, points only to the council without allusion to the corporation, and the stent-masters are to be appointed, not by the council alone, but by the College of

Justice in conjunction with the council, so that if the action would lie at all it must be directed against the college as well as the council. If it be said the council are the agents of the corporation, how can that be shown? They may be the agents of the ministers to receive, or of the householders to pay, but how are they agents of the corporation? All that the statute shows is, that the council were selected to appoint the stent-masters, because of the guarantee which their position gave, that a proper appointment would be made by them, but the statute, in no way, gives the council the character of agents. If they are not the agents of the corporation, then the only argument that can be used, is, that they have undertaken a duty for a beneficial consideration, but that argument has not been attempted. The result, then, is, that the council have a Parliamentary power with a duty, and then the action must be directed against the persons on whom the duty is imposed, which is not the corporation, but only a part of that body.

LORD BROUGHAM.—My Lords, this case has given rise to very great anxiety in the capital of the sister kingdom of Scotland, on account of the importance of the principle, and not less on account of the importance of the body, namely, the Reverend Ministers of Edinburgh, who are the Appellants here, and who were the pursuers in the Court below; the Magistrates and the Town Council representing the city of Edinburgh as a corporate body, and representing and protecting the common or corporate funds of the city, being the opposity party, the defenders below, and the Respondents at your Lordships' bar.

My Lords, the Judges below were divided, and it was by a narrow majority, seven to six, alone, that this decision was given, which is now brought here by appeal. In ordinary cases, it would give rise to great anxiety on the part of your Lordships if it were a question of purely Scotch law,—Scotch conveyancing for instance,—to find the greatest lights of that law so equally

divided. Even if it were a question not free from doubt in itself, though not peculiarly touching Scotch law or practice, an equal or a nearly equal division would cause the decision of the case to be attended with anxiety. But when I look into the Act of Parliament of the year 1661, and when I look into the arguments of the bench below, weighing respectfully and anxiously the opinions delivered on either side by the learned Judges, and weighing also the decisions cited on either side, but particularly the decisions cited by the majority, I do confess that there remains in my mind little or no doubt upon the subject-matter in question, and I also may feel some little wonder that there should have been so great a discrepancy of opinion below.

My Lords, it is perfectly clear law in England and in Scotland, and must be so in every country, that a trust may be constituted in the person of A. B. and C. in their individual capacities, or of A. B. and C., magistrates and town council of a burgh, and that that trust may be in them *quasi* trustees, for the purposes of fulfilling the obligations imposed upon them in executing that trust, and may vest them with the powers of such trustees, and subject them to the duties of such trustees, in their capacity of A. B. and C., magistrates and town council, without making the corporation of which they are the head in another capacity, and without making the city, whose affairs they administer as the magistrates of that city, a party to that trust; and, consequently, without involving the funds of that city, or the funds which those parties administer, not in the capacity of trustees under this particular trust, but in their other capacity of governors administering the funds as magistrates of that corporate town. I hold it to be perfectly clear that the two things may be kept separate; that the two capacities may be severed; and that they may be trustees, not as representing the town generally, not as dealing with the town's funds generally, but trustees under that particular limited and restricted trust, with which the town has no concern.

MINISTERS OF EDINBURGH *v.* LORD PROVOST, &c.—27th July, 1849.

My Lords, this does not appear to me to have sufficiently received the attention of the minority in the Court below; and yet if you look into the Act of Parliament, it is impossible to read it with due attention, and to have any doubt upon the subject. In the first place, I may say in passing, that if the common good of the town, previously to the Act of 1661, had been liable, and if the magistrates *quasi* magistrates administering that common good, and at the head of the town whose common good and whose property it was, had been liable before, another question might have arisen, with which it is unnecessary here to deal. But it is perfectly clear that the town was not previously liable; it is perfectly clear that the common good was not previously liable; and it is perfectly clear that this was an Act which did not make the common good liable. It says nothing of the kind; but it is an Act imposing upon the inhabitants of Edinburgh a certain amount of money to be paid as stipends to those twelve reverend clergymen; and then in order that they may be paid that sum, and in order that it may be collected, the provision is, that it shall be collected by the deacons of the kirks (that appears in practice to have been dropped, but it is part of the Act, and not at all an immaterial part of the Act), or by a collector to be appointed for that purpose. By whom? By the magistrates and town council of the burgh, in their option, as they shall think fit and expedient for the town; and the same magistrates are to appoint four sworn men in every parish to survey and value the house-mails aforesaid, whereof two shall be citizens, to be nominated, chosen, and sworn, by the town council (as stent-masters, I believe they are called), and the other two shall be nominated, chosen, and sworn, by the College of Justice.

That shews perfectly clearly, therefore, that the appointment to stent and assess, and afterwards the appointment to collect, is given to them, no doubt, in their capacity of magistrates and town council; but it is not given to them as repre-

senting the town, and having the command of the common good of the town, but they are merely appointed office-bearers and trustees for the purpose of seeing this act carried into execution.

Admitting that they have committed a breach of their duty for these three years in question, namely, from 1833 to 1836, which is the period complained of, and that they have failed to collect the sum which they ought to have collected, does it follow, because they are trustees, and are appointed to do this, being the magistrates and town council,—because it happens, accidentally, that the magistrates and town council are the persons upon whom that trust has devolved,—and that they have broken that trust,—does it follow, I say, that the common good is to be answerable for their having broken that trust? Most undoubtedly not, and if any case were wanting to prove that which the words of the Act quite sufficiently prove to my mind, I have only to refer to a very old case, but one of very high authority in the law, because Lord Stair, who mentions it, was a great lawyer, and an eminent authority;—I mean the case of Pearson of Balmadies *v.* The Town of Montrose, a case, which is nearly, as far as principle is concerned, on all-fours with the case at your Lordships' bar. There are two other cases,—Duncan *v.* Findlater, before this House, and the case of Heriot's Hospital, which go to the same point. My Lords, just see the difference (though I do not think much reference is made to that below) between this Act of 1661, and another, a much older Act, of 1579, chapter 273, to which we were referred in the able and learned argument of Mr. Anderson. In that case, there are mentioned not only the "magistrates and town council," but also "the common good" or "community," which comes to the same thing. The community is there made liable, which makes it a totally different case from the present.

My Lords, I have looked through all these opinions, and I

think nothing can be more judicious than Lord Ivory's interlocutor, and the note appended to it. The Lord Ordinary, without going further, says, that "he is prepared to adopt the "rule laid down in Balmadie's case (which is Pearson *v.* the "Town of Montrose), that the community or corporation is not "liable for their magistrates, who had not this power by their "office (*i.e.*, not apart from the statute, and as a natural adjunct "and necessary portion of their office), but by the commission of "Parliament therefor." And I find, in several other parts of the decision, similar and very judicious comments made upon that case, and upon that view of the present question.

I have, therefore, my Lords, no doubt whatever, that I shall best discharge my duty by recommending to your Lordships, subject to what my noble and learned friend may have to add, to affirm the decision of the Court below; which proposition I make, let me add, with all possible respect to the learned Judges below, without any doubt whatever.

My Lords, I ought to have stated that a great deal has been said at the bar, and a good deal in the Court below by several of the Judges, who seem to have relied upon it, with respect to the decision of 1813, and the contract of 1815 following thereupon. If you look into that, you will see that it has not, and cannot have, the least bearing upon the present question. If the magistrates had received the money, if the produce had been vested in them, then, past all doubt, they would have been answerable in a count and reckoning for that money.

LORD CAMPBELL.—My Lords, I am likewise of opinion that the interlocutors appealed from ought to be affirmed. In considering whether this action can be maintained against the Lord Provost, magistrates, and town council of the city of Edinburgh, in their corporate capacity, so as to render the common good of the city of Edinbnrgh liable for any damages recovered against them, we must strictly ascertain

what the nature of the action really is; and for this purpose we must look to the summons, the condescendence, and the pleas in law. Is it, then, like that of 1810, an action of count and reckoning, seeking to make the Defendants, as trustees, liable to the Pursuers for money received? Quite the contrary, my Lords. The *gravamen* stated in the summons and condescendence is a breach of a statutable duty, in not appointing stent-masters, whereby large sums of money which ought to have been collected for the Pursuers never were collected, and have been entirely lost to them. All doubt upon the subject must be removed by the Pursuers' plea in law,—"that the "defenders and their predecessors in office, having failed in the "performance of their statutory duty, and having, by their "culpable neglect and omission, rendered permanently irre-"coverable large arrears of the assessment which they were "bound, under the statutes, to levy for behoof of the Pursuers, "are liable officially and in their corporate capacity, for the "consequences of their said culpable conduct and neglect of "duty."

The question, then, is, Whether the eighth defence, which amounts to what in England we call a demurrer, "that this "claim is not maintainable against the corporation or the "corporate estate," shall prevail?

I conceive that if the individuals who filled the offices of Lord Provost, magistrates, and councillors, when the stent-masters ought to have been appointed, were guilty of the breach of duty imputed to them, they are only liable in their individual capacity, and their fellow-citizens cannot be punished for their default.

The liability of the parties is to be ascertained by the Act of 1661 and the subsequent Acts, extending the area over which the annuity tax is to be levied, and not by any usage or contract which could not be permanently binding on either side.

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Looking to these statutes, in what relation do the Lord Provost, magistrates, and councillors, stand in the appointment of stent-masters? Only as parliamentary commissioners to do an act. They might have been compelled, by legal process, to do that act, and for any wilful refusal to do the act, or gross negligence in doing it, they would be personally answerable.

There seems to me to be no pretence for saying, that in the performance of this duty they were trustees any more than the College of Justice, on whom a similar duty is cast. The summons, in what may be considered its *major proposition*, alleges, as the foundation of the action "that, under the provisions of "the statute above recited, the magistrates and council are "bound to the performance of a certain important ministerial "duty, in the election of stent-masters."

It would be very strange if, for the neglect of a duty so imposed upon them, the common good of the city should be liable.

At the bar the case of the Appellants was chiefly rested on the assumption that the Defendants are here sued as trustees for not paying over the stipends of the ministers of Edinburgh. But this assumption is entirely gratuitous. The interlocutor pronounced in 1813, in the suit commenced in 1810, is relied upon as an authority. This interlocutor merely proves that the Provost, magistrates, and council, having got the proceeds of the annuity tax into their hands, they were liable to the ministers for the amount, without being entitled to appropriate any part of it to their own use. The form of action and the facts of the case were there totally different from those which we have here to deal with.

The only decision that has any aspect of an authority in favour of the Pursuers is that of Innes *v.* the Magistrates of Edinburgh. But that case was materially shaken by Duncan *v.* Findlater, in which the strange notions that had prevailed in Scotland about making a trust-fund liable to a stranger for the

default of the trustees were corrected, and it can only be supported on the supposition that there is a duty on the part of the corporation of a royal burgh to repair the streets as there is to maintain a prison.

On the other hand, the case of Pearson *v.* the Town of Montrose, to which my noble and learned friend has referred, decided so long ago as the year 1669, when jurisprudence flourished in Scotland quite as much as at the present day, seems to me to rest on sound principle, and to be expressly in point. Under similar circumstances, the Court of Session found "the town and present magistrates not liable, *but*" (that is, *without*) "prejudice to the Pursuer to insist against the then "magistrates, their heirs and executors;"—thereby establishing the doctrine, that for breach of any such statutory duty the remedy is against the individuals, and not against the corporation, although in respect of their being office-bearers in the corporation the duty had been imposed upon them.

I conceive that in England the remedy would be at law against the individuals, instead of being by bill in equity for a breach of trust. The Court of Queen's Bench would grant a mandamus to compel members of the corporation to do the act, and they would be liable individually for refusing to do the act, or for doing it negligently, whereby damage accrued to the party for whose benefit the act was to be done.

I feel less diffidence in forming my opinion against so large a minority as six Judges, because their reasons seem to me to be wholly untenable. They do not treat the case as one of a fiduciary nature, but as one of contract for onerous cause, considering that by the statutable establishment of the annuity tax, the common good was relieved from a legal obligation to which it was before subject. There is no ground for contending that this is an action of contract, or that any burgh was bound at common law to support the clergy out of the common good. Nor can the circumstance be of any importance in

deciding this case, that the patronage of the city livings is vested in the corporation, nor that the corporation had been in the habit for many years before 1810, of illegally collecting the annuity tax, and appropriating a considerable part of it. I am exceedingly surprised to find Lord Moncreiff, whose judgments I have long been accustomed to admire and to reverence, saying, "It is just a process of accounting, in which the "Pursuers say that the Defenders, as representing the corporation, either have or ought to have in their possession funds "appropriated by statute to their use." This is *not* a process of accounting, and the Pursuers, instead of saying that the Defenders have funds in their possession, complain that the Defenders, in violation of the statute, did not appoint stent-masters, *whereby the funds were entirely lost.* His Lordship likewise argues as if the legality of the annuity tax were in question, and as if the reverend fathers of the kirk who were induced to give up country livings for the purpose of bestowing their pastoral care on the citizens of Edinburgh, were in danger of being defrauded and starved. No doubt is raised, or can be raised, respecting the legality of the annuity tax. My regard for the clergy of Edinburgh induces me to wish that by some equitable arrangement it could be commuted, so that they should be fully provided for in a manner less likely to cause discontent (although a groundless discontent) among those who do not take the benefit of their ministry. In the mean time, they are as much entitled to the produce of the annuity tax as any landholder is to the rents of his estate. But they must enforce the collection and payment of it by legal means. The corporation of the city is not cautioner for it; and if is lost by the misconduct of the office-bearers of the corporation, it cannot be recovered from the common good. *Culpa tenet auctores suos.*

For these reasons I agree in the motion of my noble and learned friend, that the interlocutors be affirmed, with costs.

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It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellants do pay, or cause to be paid, to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary processes or diligence for the recovery of such costs as shall be lawful and necessary.

LAW, HOLMES, ANTON, and TURNBULL—SPOTTISWOODE and ROBERTSON.

[HEARD 13*th*—JUDGMENT 16*th July*, 1849.]

ADAM BURNES, Writer in Montrose, *Appellant.*

WILLIAM PENNELL, Official Assignee, and WILLIAM COOK and Others, Creditors, Assignees of the Forth Marine Insurance Company, *Respondents.*

Process.—The Inner House, at reviewing an interlocutor of the Lord Ordinary upon a reclaiming note which brings up the whole case, is not limited to disposing of the particular ground upon which the Lord Ordinary adjudicated, but should pronounce that interlocutor which the Lord Ordinary ought to have pronounced.

Process.—It is not incompetent to object to the relevancy of the Pursuer's averments after condescendence and answer.

Partnership.—A provision in a deed of partnership that a transferee of shares in the Company shall not become a shareholder until he shall have subscribed a minute in the Company's books, is a provision in favour of the Company, not of the transferee, which the Company may dispense with.

Ibid—Ibid.—A partner in a Joint Stock Company cannot bind the Company by representations made by him in regard to the Company's affairs, although at the time he may have been likewise the law agent of the Company, the making of the representation not coming within the scope of his employment as such agent.

Ibid—Ibid.—Directors of a Joint Stock Company declaring dividends, when no profits have been earned, and which must be paid out of capital, with the view of enhancing the value of the shares of the Company, are civilly, as well as criminally, liable to those who may have been deceived by this operation into becoming purchasers of shares.

BY the deed of partnership of the Forth Marine Insurance Company, the shareholders were taken bound to pay at the

outset of its business an instalment of 10 per cent. on the subscribed value of the shares, and to advance such further proportions of their shares at such periods and by such instalments as the Directors should appoint.

The deed contained among others the following clauses:—

"VI. That it being advisable that part of the free interest "and profits should be retained and set apart to answer losses, "in order thereby to lessen the chance of encroachment on the "said advanced capital, it is hereby accordingly declared, that "there shall yearly, before division, be retained and set apart "from the clear interest and profits of the Company fifty per "cent. of the same, and that aye and until the whole sums so "retained shall amount to ten per cent. on the capital stock of "the Company, so far as subscribed at the time; and it is "farther provided and declared, that in the event of their being "a balance against the Company on their profit and loss account "in any one year, such balance shall be stated against, or paid "out of the said profits retained and set apart as aforesaid at the "time, so far as they may be sufficient for that purpose; and "the said sum of fifty per cent. on the clear interest and profits "shall from time to time, as occasion requires, be retained in "manner above directed, aye and until the sum total of retained "profits again amount as before specified to ten per cent. on the "capital stock subscribed for at the time as aforesaid.

"XV. That the partners shall not be at liberty to transfer "and dispose of the whole or any number of the shares held by "them until the expiry of twelve months from the said "day of being the period of the commencement "of this contract of copartnery, but that immediately thereafter "they shall be at liberty to do so, and that either gratuitously "or for an onerous consideration *inter vivos* or *mortis causa*. "But declaring always, that in the case of a sale or a conveyance "*inter vivos*, whether for an onerous consideration or gratuitously, "such sale or conveyance shall in no case be valid towards

" making the purchaser or assignee a partner of the Company, " unless he shall be approved of by the directors, and a minute " to that effect entered in the sederunt-book. And declaring " farther, that the directors shall be entitled to consider the " shares so attempted to be sold or assigned, and the purchaser " or assignee not approved of, as still belonging to the former " proprietor thereof. And it is likewise hereby expressly provided " and declared, that it shall not be lawful for any partner to sell, " assign, or in any way convey less than one share of the capital " stock of the Company; and in case the shares of a deceased " partner shall happen to be divided by the laws of succession, " or by a deed *mortis causa* into parts less than one share, the " holders of such fractional part shall have no right to attend or " vote at the meetings of the Company, or on account of such " fractional parts to join with others to make up a vote by proxy " under the 23rd Article of this contract; nor shall the holders " of such fractional parts have any right to interfere with the " management of the Company's business, but they shall in " every respect be subject to the same rules and regulations " with regard to calls, sales, and otherwise, as if they were each " and every one holders of complete and integral shares.

" XVII. That where the share or shares of any partner are " regularly transferred or conveyed, in terms of the articles " before written, or either of them, and that whether by the " partner himself or by the directors of the Company, the " assignation or conveyance thereof, or other deeds of trans- " ference whatsoever, or an extract from a proper record, shall " be produced to the directors, and entered in a book to be " kept for that purpose; and, in like manner, upon the suc- " cession of any heir or executor to the share or shares of a " deceased partner, proper evidence of his title to succeed shall " also be produced, and a regular entry thereof be made in the " book to be kept by the Company as aforesaid, and such pur- " chaser, assignee, heir, or executor, shall become subject to,

" and be bound to observe, the whole articles and conditions of " this contract, as well as all the regulations of the Company, " made or to be made in virtue of the powers herein contained; " and a minute to that effect shall be engrossed in the Company's " books, and regularly subscribed by such purchaser, assignees, " heir, or executor foresaid, either personally under his own " hand, or by an attorney duly authorized to act for him; and " no purchaser, assignee, heir, or executor, shall be deemed " or entitled to exercise any of the rights of a partner until " every one of these requisites shall have been complied " with."

The deed likewise provided that the books of the Company should be balanced first upon the 31st day of May, 1840, and afterwards upon the same day in each succeeding year; and that no profits arising previous to the period of the first balancing of the books was to take place, " But the clear interest and " profits of every succeeding year, as they shall appear at the " time of each balance, after deducting therefrom fifty per cent. " thereof, in manner and for the purposes before set forth " under Article VI hereof, shall be divided among the partners " according to their respective interests. But declaring always " that in striking the amount of the said clear interest and " profits for division, the directors shall have full power, and " they are hereby authorized and directed, to take into their " consideration the extent of risks then pending, and upon a " proper estimation of the same, to deduct from the said inte- " rest and profits such a proportion thereof as they shall deem " it prudent and requisite to set aside on account of the foresaid " pending risks, and that for the purpose of meeting the said " risks, should need be."

The first annual general meeting of the Company was held on the 16th of June, 1840. At this meeting a balance-sheet was exhibited, showing a clear balance of 29,135*l.* 5*s.* 7*d.*, after deducting expenses and losses actually incurred.

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The second meeting took place on the 15th of June, 1841, when the balance-sheet exhibited showed that 198,036*l.* 8*s.* 9*d.* had been received for premiums in the preceding year, and that the losses incurred, averages, and other charges, amounted to 111,962*l.* 12*s.* 7*d.*, leaving a balance in favour of the Company of 86,073*l.* 16*s.* 2*d.* On this showing of the Company's affairs, the directors recommended that a dividend of fifteen per cent. on 10,000*l.*, the amount of the paid-up capital, should be declared; and this was agreed to by the shareholders.

It was resolved at this meeting that the balance-sheet to be reported to the third general meeting in June, 1842, should be confined to the business done between 31st of May and 31st December, 1841, "with the view of leaving a space of five "months to exhaust in some measure the outstanding risks and "enable the directors to estimate the profit and loss from the "results of experience."

The third meeting was held on the 21st of June, 1842, and the balance-sheet then exhibited, showed that there had been received for premiums during that period, 152,592*l.* 15*s.* 4*d.*, and that the losses and averages already settled amounted to 99,193*l.* 3*s.*, leaving a balance of 53,399*l.* 12*s.* 4*d.*

But the directors reported to the meeting that there was a very large amount of losses unsettled, and that after deducting these, so far as they were known, and the estimated amount of those unknown, the balance would be reduced to 6,337*l.* 13*s.* 2*d.* They further reported that although during the preceding year the payment of losses, &c., and the dividend of the previous year, amounted to 234,954*l.* 9*s.* 11*d.*, yet a balance remained in favour of the Company of 62,082*l.* 17*s.* 10*d.* The meeting approved of the directors' report, and resolved that a dividend of 7 per cent. on the paid-up capital should be declared.

On the 26th of July, 1842, the directors made a call upon the partners of 10 per cent. upon the subscribed capital. This call was duly intimated to Mc Kenzie, a holder of fifty shares,

who at this time was a clerk in the service of the Appellant, a solicitor in Montrose, and in consequence of his failure to pay it at the time specified, a correspondence ensued between him and the secretary of the Company, which was taken up by Gilmour, who was the solicitor, and at the same time a shareholder of the Company, and had instructions to enforce payment of the call. On the 5th November, 1842, Gilmour wrote Mc Kenzie an urgent letter, which he answered by saying that the Appellant was to be in Edinburgh on the 13th of November and would call on Gilmour to arrange the matter.

On the 15th of November the Appellant called upon Gilmour, and asked from him information as to the affairs of the Company, and expressed a desire to relieve his clerk (Mc Kenzie) from the liability he had incurred. Gilmour upon this occasion showed the Appellant the reports which have been alluded to as having been presented to the previous general meetings, and a conversation ensued from which the Appellant was induced, by what fell from Gilmour, to take so favourable a view of the concerns of the Company, that within ten days afterwards he purchased Mc Kenzie's shares for 200*l.*, or at a premium of 75*l.* above what had been paid up by Mc Kenzie. The Appellant on the 25th of November wrote the secretary of the Company that he had made the purchase, and would remit the amount of the call which had been made, so soon as the transfer from Mc Kenzie to him should be approved of. On the 30th November, Gilmour intimated to the Appellant that the sale to him had been approved of by the directors on condition of the Appellant paying the call that had been made. On the 2nd of December a deed of transfer was executed by the parties, and on the same day the Appellant remitted the amount of the call to Gilmour, through whom it was paid over to the Company; but the Appellant did not then or at any subsequent period subscribe the minute in the Company's books required by the 17th article of the deed of partnership.

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On the 19th of December, 1842, the directors made a further call upon the partners of 20 per cent., payable by two instalments, on the 1st of March and 1st of May, 1843, in order to meet pressing demands upon losses which had occurred.

The proceedings of the directors in regard to the making of this call, and the arrangements made by them for discharging the claims of the Company, were approved of by a general meeting of the shareholders, which was held on the 20th of June, 1843, which also authorized a further call of 15 per cent. to be made for liquidation of still further losses upon the policies of the Company.

The Appellant did not pay either of the last-mentioned calls. In consequence the Company, in July 1843, brought an action against him to compel payment. The Appellant pleaded defences to this action, and subsequently, in May 1844, brought an action against the Company and likewise against Mc Kenzie, concluding to have the transference to him by Mc Kenzie reduced and set aside, and to have it declared that he had never been a partner of the Company and was in no way responsible as such, and also concluding for repetition of the amount of the call which he had paid to the Company.

The grounds upon which the Appellant rested this action were: 1st, that at the time of his purchase from Mc Kenzie he was led to believe that the stock of the Company was a fair marketable article and subject of sale, whereas it was of no value whatever, because of the losses which had been previously sustained, but which had been kept concealed by the directors, whereby at the time of the sale the Appellant was labouring under error as to the nature and existence of the subject of the sale. 2nd. That he had been induced to enter into the sale through the fraudulent concealment and misrepresentation of the defenders by Gilmour, their partner and law agent, for the purpose of substituting the Appellant in the place of Mc Kenzie,

who was known to them as being a person of no means or ability to answer the demands of the Company upon him.

The averments of the Appellant in support of this action were to this effect:

"The whole sales of the Company's stock, which took place "betwixt the general meeting of June 1842 and the date of "the transaction with the defender, were made by directors, "extraordinary directors, or trustees of the Company, who "possessed knowledge of the ruinous state of its affairs, and "for the purpose of avoiding the loss to which they were "exposed by holding shares of the concern. One of these "parties, on being permitted to retire, granted bond to the "Company without the knowledge of the purchaser, whereby "he continued his liability for the whole debts and obligations.

"The directors of the Company, from the commencement "down to the date of the said transaction with the defender, "practised a system of deception upon the partners of the "Company, and upon the public in general, by making up and "exhibiting false statements and balance-sheets, such as to "make it appear that the affairs of the Company were in a "prosperous state, and such as apparently to justify a large "division of profits for several successive years. Whereas, "during these years, the Company, so far from making profit, "had actually sustained enormous losses; and by these fraudu-"lent devices, as well as by the misrepresentations of their law "agent Mr. Gilmour, the defender was deceived and misled, "and thereby induced to enter into the foresaid transaction "of sale.

"At the date of the transfer to the defender, when he was "entrapped as before mentioned, and previously, the affairs of "the Company were in a state of irretrievable ruin, and they "were known to the directors, office-bearers, and law agent to "be so.

"The directors of the said Company, by dealing with the

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" defender as if the stock of the said Company was then a fair " marketable article and subject of sale, when they knew and " concealed the fact of the ruinous state of their affairs, and " that the Company's stock was not only of no value whatever, " but must inevitably be the cause of enormous loss to the " holders thereof, and by receiving the sum stipulated as the " price, were guilty of fraud, misrepresentation, and undue " concealment."

McKenzie did not put in any defence to this action, and decree in absence was pronounced against him.

The Respondents pleaded in defence: 1st, That the Appellant, as a partner of the Company, was bound to pay the money sued for; 2nd, That the Appellant's allegations were not founded in truth, and were not relevant to protect him from paying up the proportion of the stock corresponding to the shares held by him; 3rd, That the allegations upon which the challenge of the transfer was founded were not relevant in law to support the challenge; 4th, That the challenge was barred by the act of the Appellant in obtaining himself to be enrolled as a partner, and continuing so enrolled, and so preventing the Company from compelling McKenzie to pay up the capital upon the shares transferred.

The two actions by the Respondents and by the Appellant were conjoined. On the 3rd of July, 1847, the Lord Ordinary (Wood) pronounced the following interlocutor:—" Finds, in " the reduction and declarator, that the statements made in the " record by Adam Burnes, the pursuer of said action, are relevant " to support the reductive conclusions thereof, and therefore " repels the defences for the Forth Marine Insurance Company, " and the third plea in law, annexed to the revised and amended " condescendence of the Company, in so far as it is in said " defences or plea maintained that the allegations upon which " the said Adam Burnes founds, in support of his challenge of " the writ or writs called for to be set aside, even if true, are not

" relevant in law to support such challenge; and, before further " answer, appoints the process to be enrolled, that parties may " state how they propose that the cause shall be proceeded with."

The Respondents reclaimed against this interlocutor, and by their note prayed the Court " To recal or alter the interlocutor " submitted to review, and, in the reduction and declarator, to " sustain the defences for the Forth Marine Insurance Com- " pany, and the third plea in law annexed to the revised and " amended condescendence for the Company, and to assoilzie " the said Company from the conclusions of the said action of " reduction and declarator; and, in the action at the said Com- " pany's instance, to decern in terms of the conclusions of the " libel, to find the said Forth Marine Insurance Company entitled " to expenses in both actions; or to do otherwise in the premises " as to your Lordships shall seem just."

On the 16th of February, 1848, the Court pronounced this interlocutor:—

" Alter the interlocutor of the Lord Ordinary reclaimed " against: Find, that in the month of December 1842, Adam " Burnes, defender in the ordinary action, and pursuer in the " reduction, became a partner in the Forth Marine Insurance " Company to the extent of fifty shares of the capital stock " thereof: Find, that there are no averments on record relevant " to set aside the transaction by which the said Adam Burnes " became a partner as aforesaid, or to liberate him from the " obligations and liabilities thereby undertaken by him to the " extent of fifty shares as aforesaid: Therefore, in the reduction, " repel the reasons of reduction, sustain the defences, and " decern; and in the action at the instance of the manager " of the Forth Marine Insurance Company, now insisted in by " the official and creditor assignees of the bankrupt estate of " the said Company, repel the defences stated by the said Adam " Burnes, and decern in terms of the libel: find the said Adam " Burnes liable in expenses in the said actions; appoint an

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"account thereof to be lodged; and remit to the auditor to tax "the same and to report."

The appeal was taken against this interlocutor, and a subsequent one modifying the expenses.

Mr. Attorney-General and *Mr. Anderson* for the Appellant.—I. All that was disposed of by the interlocutor of the Lord Ordinary was the relevancy of the averments in the reduction and declarator to support the conclusions of that action. The interlocutor left untouched the action for payment of the calls. It was, therefore, *ultra vires* of the Inner House as a court of review to do more than assent to or dissent from—to adhere to or alter the Lord Ordinary's finding. Dissenting from the Lord Ordinary's opinion as to the relevancy, the interlocutor of the Inner House does not confine itself to altering his interlocutor in this respect, and remitting to the Lord Ordinary to proceed further, but it goes on in the exercise of an original jurisdiction to dispose of the action by the Respondents which the Lord Ordinary had not in any way considered. The interlocutor of the Court, therefore, was void, and ought to be altered.

II. After condescendence of facts, and a full answer to each averment, it is no longer competent to object to the relevancy of the facts averred; the facts must go to the decision of a jury. Here a full answer to the averments of the Appellant had been made by the Respondents. It was not competent, therefore, for the Lord Ordinary or the Court to determine the relevancy at the stage at which the case had arrived. McDonald *v.* McKie & Co., 5 *Wils. & Sh.* 462.

III. According to the provisions of the deed of partnership, it was necessary, before the Appellant could become a partner, that he should, in pursuance of the 17th Article, have signed a minute agreeing to observe the conditions of the deed. Until he did this, he was no partner. The stipulations of this article were not in favour of the Company alone; they were reciprocal.

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It was in the power of the Company to refuse to allow him to become a partner, and it was equally in his power to refuse to become one. Preston *v.* Collier Dock Company, 2 *Railway Cases*, 335; Hebblewhite, *v.* McMorine, *Ibid.* 51.

IV. If the Appellant had in form become a partner without signing the Company's books, he had been induced to become so through the falsehood and fraud of the directors, or those employed by them. The accounts which were exhibited by the directors were intended by them to produce the notion that the Company was in thriving and prosperous circumstances, while the reverse was the truth. Accordingly, while they paraded the large amount of premiums which had been received in the first year of the Company's business, and brought out a balance of 29,135*l.*, after deducting actual losses, they concealed the enormous amount of risks which were still open, and did not make any estimate of the probable losses yet to be incurred, or any deduction from the balance on this account. So in the second year the directors exhibited a balance-sheet showing a surplus of 86,073*l.*; but in this instance they not only, as in the other, did not make any deduction for the estimated loss upon outstanding risks, while they brought into account the premiums paid in respect of these risks, but they omitted to bring into account the amount of the losses which had already been incurred, but which had not as yet been settled with the parties claiming. Nevertheless, they recommended, and the Company adopted their recommendation, that a dividend of 15 per cent. on the paid-up capital should be declared. Again, at the third meeting, in June 1842, by the balance-sheet brought into account, the premiums which had been paid up to the day of the account, although the resolution of the previous meeting had been that the accounts should be confined to the business done from the period from 1st June to 31st December, 1841. If this had been adhered to, the premiums received between 31st December and the date of the meeting would have been

excluded by the balance; but by bringing them into the balance, and not stating against them any estimate of the probable loss to be incurred in respect of these premiums, an apparent surplus of 6,337*l.* 17*s.* 2*d.* was shewn, out of which a dividend was again declared, although the fact of the losses already paid having nearly exhausted the great amount of premiums received, leaving only this small sum of 6,337*l.* 17*s.* 2*d.*, must have impressed the conviction that in the result the concern would be a ruinous one.

The object of all these accounts was to deceive the shareholders and the public into the belief that the concern was prosperous. This effect was produced upon the Appellant by Gilmour, who exhibited these accounts to him while making up his mind whether to take McKenzie's shares. And as Gilmour was not only a shareholder, but acting as the law agent of the Company, the deceit thus imposed on the Appellant was the act of the Company, for which it must be responsible to the effect of relieving the Appellant of all liability arising from the purchase he had made under the influence of this deception. It is not necessary that there should have been either a legal or moral obligation on the directors to disclose to the Appellant the true state of the Company's affairs, or that they should themselves have given the erroneous information. It is sufficient that the Appellant has been deceived in a matter which was within their knowledge, and by Gilmour, who was employed by them. Fuller *v.* Wilson, 3 *Ad. & Ell. N.S.* 58; Evans *v.* Collins, 5 *Ad. & Ell. N.S.* 804; Langridge *v.* Levi, 2 *Mees. & Wels.* 519.

Neither is it an answer to the Appellant to say that the accounts and the statements of Gilmour were not made with the view and intent to induce him to make the particular purchase. The object may have been to induce insurances by the public, or give fictitious value to the shares in the market; but if the evil effect has been produced, this is sufficient to entitle the Appellant to relief. Stainbank *v.* Fernley, 9 *Sim.* 556.

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That a fraudulent object was intended is shown by the facts averred by the Appellant in regard to the conduct of the directors in the sale of their own shares; that effect was produced upon the Appellant. If a dormant partner of an ordinary trading company were to induce the purchase of a share of the company's business through a fraudulent representation of its value, the company could not take advantage of the transaction, although a representation of the state of the company's affairs was not within the province of the dormant partner—a partner of a joint stock company is neither more nor less than a dormant partner. Even, therefore, if it could be said that the communication of Gilmour to the Appellant, acting, as he was at the time, as the agent of the directors, *i. e.*, of the Company, was not the communication of the directors, still, as Gilmour was likewise a shareholder, the result would be the same.

A member of a joint stock company has no power to contract or make representations on behalf of the Company. It may be said, So neither has a director power to make representations as to the state of the Company's concerns, that is not within the sphere of his duties; but if the partner or director do make the representation, the Company cannot take the benefit of any transaction arising out of it.

Mr. Rolt and *Mr. Inglis* for the Respondent.—I. From the time when the two actions were conjoined there was but one action before the Court. It was competent, therefore, for the Lord Ordinary, instead of confining his interlocutor disposing of the relevancy of the averments to support the action of reduction, to have disposed of the action for calls upon its merits, if he had been of opinion that the action of reduction was not founded upon relevant grounds. The Inner House, while reviewing the Lord Ordinary's interlocutor, stood precisely in the same position that he had done, and might com-

petently reverse his interlocutor and pronounce that interlocutor which, in the opinion of the Court, he ought originally to have pronounced.

II. It was not possible for the Respondents to have objected to the relevancy of the Appellant's averments until these were made upon the record. The 4th sect. of 6 Geo. IV, cap. 120, enacts that the Court shall not give judgment upon the merits until the averments of the parties in fact and their pleas in matter of law shall be set forth on the record. This provision of the statute had in no way been departed from, and prevented any other course being taken than that which had been taken. In Mackie & Co. *v.* Mc Donald, the objection of want of relevancy was not raised upon the defences, although the averments upon which the action was founded were sufficiently set forth in the summons to call for this defence. The defender reserved the objection of want of relevancy in the action until after specific averments of every fact to be proved in support of the action had been made, in other words, until nothing remained but to ascertain the truth of these averments by the verdict of a jury. But the Court, confounding their province as judges of the law with the functions of a jury as judges of the fact, determined upon the truth of the facts alleged, and hence the reversal of their judgment in that case.

III. The 17th clause of this deed of partnership was not intended for the benefit of transferees of shares, but was manifestly a provision in favour of the Company, and for its protection by preserving evidence of the liability of incoming partners. It was in the power of the Company, therefore, either to insist upon the provision against the party, or to waive it in their own favour. In Preston *v.* Collier Dock Company, no transfer whatever had been executed by the party, as in the present instance, and, moreover, there was the enactment of a statute prescribing the particular form of transfer to be used. The question that occurs in the present case never was

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raised in that one. But it was raised and decided in favour of the Respondent's position in two cases which occurred in Scotland East Lothian Bank *v.* Turnbull, 3 *S. & D.*, and Allan *v.* Turnbull, 7 *Wil. & Sh.* 281.

IV. Though the imputation of fraud is in terms ascribed to the acts of the directors, there is no averment of that which does in fact amount to fraud, or anything like it. It was no duty of the directors to introduce into the annual balance-sheets a statement of the Company's business: and if they had tried to make a calculation of the unascertained losses, there were no data on which they could have proceeded. The conduct of the directors might have been imprudent, but could not be said to have been fraudulent. It was necessary, however, for the Appellant, in order to entitle him to the relief he asked, to have averred not only misrepresentation, but that the misrepresentation was made with the intention of deceiving him as to the particular matter in regard to which the misrepresentation was made. A mere naked falsehood stated to a party will not give him any right of action. The misrepresentation must have been made with the intention that the party should act upon it. But there is no allegation that the accounts which are alleged to have been fraudulently concocted were made with the view of inducing the Appellant in particular to purchase shares. They might have been made with the view of increasing insurances, but they could not well have had the Appellant's purchase in view. But even if their acts would warrant a claim of relief against the directors personally, they could not be the foundation of a claim against the Company at large. A Company may be bound by the acts of a partner in everything incident to the partnership; but inducing strangers to become partners can never be said to be within the scope of a partnership. In Stainbank *v.* Fearnley, the suit was not directed against the Company, but against the individual director by whom the fraud had been committed. But none of the cases

show a successful claim for relief, not against the director or officer making the misrepresentation, but against the Company itself, of which indeed the Appellant is himself by the statement of his summons one of the partners.

With regard, again, to the part which Gilmour is alleged to have acted, he was the law agent of the Company, and was employed alone in that character. He could not, therefore, bind the Company by anything he stated, beyond what came within the scope of his employment. No doubt he was likewise a partner; but this was not a common trading partnership, in which the representation of one partner will bind the other partners, but a joint stock company, as to which all power is withdrawn from the shareholders, and centred in the directors. In short, there is no allegation of anything amounting to fraud, nor of any representation made by the directors, or any one authorized by them to the Appellant, with the view of inducing the result of which he complains.

LORD CAMPBELL.—My Lords, on the 28th of July, 1843, the Forth Marine Insurance Company, established in the year 1839 as a joint stock company, with transferable shares, commenced an action against the Appellant for calls, alleging that he had become a member of the Company by purchasing and accepting the transfer of fifty shares on the 2nd day of December, 1842. The calls sued for were—one ordered on the 19th of December, 1842, of 20 per cent., and another ordered on the 22nd of June, 1843, of 15*l.* per share.

By his defences he denied his liability as a shareholder, and on the 28th of May, 1844, he commenced an action of reduction against the Company and against David Mc Kenzie, from whom he had purchased the fifty shares, praying by his summons that the transfer of the shares to him might be set aside; that it should be declared that he never was a partner in the Company or liable as such; that he should be reponed and restored

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in integrum; that it should be declared that the said David Mc Kenzie remains liable in respect of the fifty shares; and that the sum of 200*l.* paid by him for the shares should be repaid to him with interest.

Although no fraud was alleged against David Mc Kenzie, he (it is alleged) collusively made no defence, and there was a decree against him in absence.

The Company making defences to the action of reduction, the Lord Ordinary very properly conjoined this action with the action at the suit of the Company for calls. In the conjoined actions there was one record, which set forth the condescendence of the Company with the answers of Mr. Burnes, and Mr. Burnes's statement of facts with the answers of the Company, and the pleas in law on both sides. The second and third pleas in law on behalf of the Company, on which the case depends, were, that Mr. Burnes's allegations are not relevant in law to protect him from the payment of the calls, or to support his action of reduction.

The case came on to be argued before Lord Wood as Lord Ordinary, and he, by an interlocutor dated 3rd July, 1847, "found, in the reduction and declarator, that the statements "made in the record by Adam Burnes, the pursuer of said "action, are relevant to support the reductive conclusions "thereof."

On behalf of the Company there was a reclaiming note, and on the 16th of February, 1848, their Lordships of the first division altered the interlocutor of the Lord Ordinary reclaimed against: Find, that there were "no averments on record relevant "to set aside the transaction by which the said Adam Burnes "became a partner as aforesaid, or to liberate him from the "obligations and liabilities thereby undertaken by him to the "extent of fifty shares as aforesaid. Therefore, in the reduction, "repel the reasons of reduction, sustain the defences and "decern, and in the action at the instance of the manager

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"of the Forth Marine Insurance Company, repel the defences "stated by the said Adam Burnes, and decern in terms of the "libel, and find the said Adam Burnes liable in expenses in the "said actions."

From this interlocutor Mr. Burnes has appealed to your Lordships' House. And the first objection taken to it by his learned counsel is, that it finally disposes of both actions, whereas the Lord Ordinary had only decided a single point in the action of reduction, and had given no opinion respecting the action for calls, it being contended that the Inner House had exceeded its jurisdiction, which was confined to a review of the decision of the Lord Ordinary on the point which *he* had disposed of. This objection was not made in the Court below, where all the questions arising in both actions were very copiously discussed without any doubt as to jurisdiction, and it is not even hinted at in the cases laid on your Lordships' table. I am of opinion that it is wholly untenable. The reclaiming note professed to bring, and brought, both actions before the Inner House, and the Inner House, as the Court of Appeal, was empowered, and was bound to pronounce the judgment which ought to have been pronounced by the Court of first instance. The Lord Ordinary, if he had thought fit, might have reported both actions at once to the Inner House without deciding anything; and when the case came before the Inner House upon the reclaiming note, an equally extensive jurisdiction was conferred upon them.

Another technical objection is made, that the plea of want of relevancy was incompetent, after a condescendence and statement of facts. But I am of opinion that this is equally untenable. According to the existing procedure in the Court of Session (which I agree with a very learned Judge of that Court, who has lately published an able tract upon that subject, stands greatly in need of amendment), generally speaking, till condescendence, the cause of action is not fully developed, and it is

not properly known what the facts are on which the party relies, and which he undertakes to prove. If, in an action which the Judicature Act does not require to be sent to a jury, there must be a jury trial to ascertain the truth of facts which are wholly irrelevant, the most inconvenient consequences would ensue, but on the construction of the Judicature Act, the fit time to deny the relevancy of allegation is, when those allegations have been made. The case of Macdonald *v.* Mackie is no authority to prove the general position, that there cannot be a plea to the relevancy after condescendence, but only, that if the defender, instead of relying on want of relevancy, pleads a new defence, resting upon new facts which he adduces, he cannot afterwards avail himself of want of relevancy.

Another objection made by the Appellant of a formal nature, is, that he had not subscribed an entry in the Company's books according to the 17th article of the deed of co-partnery, which, upon a transfer of shares, requires such a subscription, and declares "that no purchaser shall be deemed or entitled to exercise "any of the rights of a partner until this requisite be complied "with." Although this objection was, after long argument, abandoned by the Appellant's counsel in the Court below, they are not precluded from taking it here, as it is raised by the record; but I am of opinion that it was properly abandoned below, because it is untenable. Looking to the 17th and the preceding article, it is quite clear that the subscription in question is a duty cast upon the purchaser for the benefit of the Company, and that he cannot take advantage of his own default. On the 2nd of December, 1842, there was a regular deed executed, to which Mr. Burnes was a party, and by which, with his consent and with the privity and sanction of the Company, the fifty shares were regularly transferred to him. Therefore, it became his duty to see that the form specified in the 17th article was complied with. From his default the Company might have said that he was "not to be deemed, or entitled, to

" exercise any of the rights of a partner," but *he* is forbidden to avail himself of any such plea.

We come, therefore, to the question which the Lord Ordinary decided. If the deed of transfer stands, and Mr. Burnes had become a partner, there can be no defence to the action for calls. Everything depends, therefore, on " whether the state-" ments made by him in the action of reduction are relevant to " support the reductive conclusions thereof."

Now we certainly have nothing here to do with evidence, and all the allegations of relevant facts must be taken to be true, whether, upon the record, they are admitted or denied. But facts must be averred with reasonable precision, which, if proved, would be sufficient to support the reductive conclusions of the summons. It is not enough to set forth general allegations of fraud against the defenders. Facts must be alleged which show that such a fraud has been practised by them upon him, as will entitle him to the judgment which he prays.

I am first struck by a circumstance which I do not find noticed in the Court below, that, although it be sought to set aside the transfer against Mc Kenzie, to fix upon him a continuing liability as a partner, and to have a decree pronounced, by which, having sold his shares for 200*l.*, of which sum only a small portion came into his pocket, he would have to pay at least 1000*l.* in respect of subsequent calls. As far as he is concerned, there really is no allegation of fraud to impeach the transaction, either in the summons or condescendence. If the directors are liable to all the charges brought against them, he was sinned against as one of the innocent and betrayed shareholders.

But if the Company cannot avail themselves of any defect in the case, as far as he is concerned, after the decree against him in absence, let us see what facts are alleged, in respect of which the reduction is to be supported against the Company.

Your Lordships will bear in mind that the transfer to be set

aside was executed on the 2nd of December, 1842, and that Mr. Burnes tells you that, till the preceding month of November, he knew nothing about the affairs of this Company (being, probably, ignorant of its existence), and that he then became acquainted with it, from the circumstance of David Mc Kenzie, his clerk, being a shareholder, and unable to pay a call.

Montrose is his usual place of residence, but he then happened to be in Edinburgh, and certain communications were made to him by Mr. Gilmour, who was the law agent, or, as we say in England, solicitor to the Company, and had been employed by the Company in that capacity to sue Mc Kenzie for the arrears.

Now, my Lords, the question arises, whether the Company be bound by the communications which Mr. Gilmour then made to Mr. Burnes respecting their commercial affairs and their commercial prosperity; for, if they are not, we need not consider the weight and effect of the representations then made. My Lords, I am of opinion that, in making these representations, he was not acting within the scope of his authority from the directors or the Company. He was employed by them only as a lawyer to demand and sue for a debt from a shareholder, and he had no authority to make any disclosure respecting the concerns or the condition of the Company to a stranger, who contemplated the purchase of shares in the Company.

It was hardly contended at the bar that the Company are bound by what Mr. Gilmour said or did on this occasion, merely because he was the law agent of the Company; but it has been most strenuously argued, that the Company are bound by all that he said and did, on the ground that he was himself a shareholder in the Company. We are told that a joint stock company (at least if not incorporated, and only empowered by a public Act of Parliament as this is, to sue and be sued by its officers) is in the same situation as any mercantile partnership consisting of two or three individuals carrying on business jointly under an ordinary deed of partnership, or by a parole

agreement among themselves of which the world is ignorant; in which case, what is said or done by any one partner respecting the partnership business affects all the partners, although in violation of their agreement *inter se*. But why is this so? Because, carrying on business jointly under a common firm, they hold out to the world that each of them has authority to manage the partnership concerns. Therefore, all are bound by what each does in conducting the parnership business. All the members of the firm are liable to the *bonâ fide* holder of a bill of exchange drawn, accepted, or indorsed, by any one of them. But supposing that A. B. and C. entering into partnership, it is expressly stipulated that A. shall not draw, accept, or indorse bills in the partnership firm, and this stipulation is known to X., I apprehend that he would have no remedy against B. and C. on a bill of exchange which he induced A. to draw, accept, or indorse. Therefore, on the principles which regulate the liability of common partners, a distinction must be made between a member of a common mercantile partnership, and a shareholder in a joint stock company. No one will contend that a joint stock company would be liable on a bill of exchange drawn, accepted, or indorsed by any one shareholder. Why? Because it is known that the power of carrying on the business of the company, and of drawing, accepting, and indorsing bills of exchange is vested exclusively in the directors. This shows, that although a joint stock company is a partnership, it is a partnership of a different description, and attended with different incidents and liabilities from a partnership constituted between a few individuals who carry on business jointly, with equal powers and without transferable shares. All who have dealings with a joint stock company know that the authority to manage the business is conferred upon the directors, and that a shareholder, as such, has no power to contract for the company. For this purpose it is wholly immaterial, whether the company be incorporated or unincorporated.

Here, it is not alleged that Mr. Burnes knew that Mr. Gilmour was a shareholder; or that in respect of his being supposed to be a shareholder, he gave any faith to his representations. Mr. Burnes knew, or might have known, that there were nine directors appointed to manage the business of the Company. He knew that Mr. Gilmour was not one of them; and he dealt with Mr. Gilmour merely as the law agent employed to recover the arrears due from Mc Kenzie. The doctrine contended for would lead to the conclusion, that a joint stock company is liable on any contract entered into by any shareholder within the scope of the business, for carrying on which the Company is established; and that any contract regularly entered into with the directors may be vitiated by anything said or done by any shareholder, without the authority or privity of the directors. Considering the important transactions now carried on through the medium of joint stock companies, this doctrine is very alarming; but it rests on no principle, and no authority has been cited to support it. The case relied upon, of Stainbrook *v.* Fernley, 9 *Sim.*, 556, I entirely approve of; but that was a bill filed by the purchaser of shares in a joint stock company against his vendor, who was alleged personally to have deceived the plaintiff by a false statement of material facts; and there, without affecting the interests of the company, the plaintiff sought repayment of the purchase-money with interest, on re-transferring the shares to the defendant. The Vice-Chancellor of England, therefore, rightly held that the plaintiff stated a case entitling him to relief.

We now come then to the allegations respecting the acts of the directors themselves; and if the Plaintiff has been deceived and defrauded by them, and induced by them to purchase the shares by their false representations, the interlocutor must be reversed. I do not think it necessary, even, that the representations should have been made personally to him. If the

directors have made false representations for the purpose of fictitiously enhancing the price of shares for their own benefit, and the Appellant has thereby been deceived and induced to purchase shares greatly beyond their value, the transfer of the shares, although executed, ought to be set aside. But the transfer having been executed, a clear and strong case of fraud ought to be established, and it must be shewn that the purchaser of these shares was induced to purchase them by the deceit of the directors.

Your Lordships will observe, that the misconduct imputed to those directors resolves itself into misconduct as between them and the shareholders. The directors are not charged with any design to raise the value of shares in the market fictitiously, for the purpose of obtaining a high price for shares to be sold on behalf of the Company, or which they themselves held individually. Nor is any connection alleged between the supposed misconduct of the directors and the purchase of the shares by the Appellant. Their acts of imputed misconduct begin years before he had purchased or entertained any intention of purchasing shares; and surely, it cannot be contended that the purchaser of shares in a joint stock company, when sued for calls, may get rid of his liability by shewing that at some past period the directors have misconducted themselves. Assuming that the accounts rendered by these directors to the shareholders were erroneous or false, there is no allegation that they were ever brought to the notice of the Defendant except by Mr. Gilmour; or that he knew anything of their contents before November 1842; or that they were ever made public or exhibited except at a meeting of the shareholders. Suppose that an action were brought by Mr. Burnes against the directors for a deceitful representation, whereby he was induced to purchase the shares at a fictitious value, what facts are alleged upon this record to support the action? Mr. Burnes himself attributes his unlucky purchase entirely to what passed

between him and Mr. Gilmour, for which the directors are not answerable.

But looking to the accounts, they really cannot be said to be false or fraudulent. It is not enough to bestow such epithets upon them, if upon examination they cannot be charged with falsehood. But the accounts rendered in June 1841, and June 1842, do not state what is false. There is in them no falsification of figures. They give a true statement of the premiums received, and the adjusted losses. In a balance-sheet only liquidated items can appear either on the debtor or creditor side. The complaint, that the balance-sheet contained no statement, and made no estimate of pending risks, is absurd. Such a statement could not be introduced into a balance-sheet; and if the business were prudently conducted, the greater the amount of the pending risks the more prosperous was the condition of the Company. No estimate could be made of losses thereafter to accrue, unless the directors had been endowed with the faculty of second sight, and could have discovered the shadows of coming shipwrecks and captures.

The grave part of the charge against the directors, really resolves itself into the supposed fictitious dividends of 15 per cent. ordered in June 1841, and of 7 per cent. ordered in June 1842. I repeat what I threw out during the argument (and for which I had the high sanction of my noble and learned friend), that it is most nefarious conduct for the directors of a joint stock company, in order to raise the price of shares which they are to dispose of, to order a fictitious dividend to be paid out of the capital of the concern. Dividends are supposed to be paid out of profits only; and when directors order a dividend to any given amount, without expressly saying so, they impliedly declare to the world that the Company has made profits which justify such a dividend. If no such profits have been made, and the dividend is to be paid out of the capital of the concern, a gross fraud has been practised, and the directors are not only

civilly liable to those whom they have deceived and injured, but in my opinion they are guilty of a conspiracy, for which they are liable to be prosecuted and punished. I am one of those who think that Lord Cochrane was unjustly convicted of conspiracy by false rumours to raise the price of the public securities for his own advantage, and to the injury of the King's subjects who were deceived; but no one has gravely doubted, that the offence imputed to him amounted, in point of law, to a misdemeanor. There can be no doubt, therefore, that a conspiracy by falsehood (as by a fictitious dividend), to raise fictitiously the market value of shares of a railway company, or any other joint stock company, that the Queen's subjects may be deceived and injured, and that at their expense a profit may be made by the conspirators, would be an indictable offence.

But setting aside the objection, that here there is no sufficient allegation to connect the supposed fraud with the act of the Appellant in purchasing the shares, how can it be said that the dividend was paid out of capital? The capital of the Company consisted of the 10,000*l.* paid up of the 100,000*l.* of capital subscribed. The 1500*l.* set aside for payment of the 15 per cent. in June 1841, and the 700*l.* for payment of 7 per cent. in June 1842, were taken from premiums which had been received to a vastly greater amount. It might be imprudent to order those dividends, but it does not follow that they were ordered fraudulently; and there is no allegation that they were ordered in contemplation of the sale of any shares, either for the benefit of the Company, or for the benefit of the directors. There is no surmise even that the dividends were connected with any traffic in the shares of the Company. I may observe, that in such a concern as this there must be infinite difficulty in fixing a fair dividend. In railroad companies it must be comparatively easy, for there is no risk to calculate (except, perhaps, that of killing a certain number of Her Majesty's subjects, for which there ought to be a handsome

reserve). The directors have only to take an account of receipts and outgoings, and striking a balance to ascertain according to Cocker how much is to be ascribed to each share. But the directors of a Marine Insurance Company must look to the probabilities of war and peace, and take into consideration accounts of distant tempests to which ships insured by them may have been exposed. If lives are insured they must attend to the approach of the cholera and the sanitary precautions adopted to meet it. This month there may seem grounds for a good dividend, and the next month a call may be indispensable.

The fact is alleged and not denied, that there having been a dividend ordered of 7 per cent. in June 1842, in the month of July following a call was ordered of 10 per cent. The conduct of the directors in ordering a call so soon after a dividend, has been severely animadverted upon; but it might be perfectly justifiable from the varying circumstances of the Company, and, at any rate, Mr. Burnes has no right to complain of it as a ground for the reduction of the transfer, for he himself admits that he was fully aware of it in November 1842, before he had purchased the shares and before the transfer was executed. If such a coincidence of *dividend* and *call* be conclusive proof of insolvency, then he wittingly became a member of an insolvent company, and there is no pretence for saying that he was deceived. But, in truth, he was perfectly satisfied with his bargain till the subsequent calls were made for which the original action was brought. I believe that his bargain was a very bad one, but he had to blame only his want of caution in entering into it. If he had made inquiries of the directors or the actuary, their authorized agent to give information, he probably would have found that heavy losses had lately arisen which would not have been properly introduced as items in any preceding balance-sheet; but he was probably pleased with the amount of premiums, and calculated that these would all turn out to be pure profit.

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However this may be, I concur in the unanimous opinion of the first division of the Court of Session that he has not averred any facts which entitle him to be released from the engagement into which he deliberately entered as a shareholder of this Company.

Some rather harsh remarks have been made upon the learned judges, as if they had confounded *allegations* and *evidence*. But giving a fair construction to the language they use, although it is sometimes a little rhetorical, I think the import of their opinion is, that looking to the facts which the Appellant avers, and taking those facts to be true, without regarding merely vituperative epithets, they do not make out any case of fraud practised upon him, and that he must be left to suffer the effects of his own imprudence.

For these reasons, my Lords, I move your Lordships that the interlocutor appealed from be affirmed, with costs.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the conclusions at which he has arrived, and after the very able and elaborate manner in which he has gone into all the points of this case, both into the less important technical matters with which he prefaced his argument, and into the merits of the case itself as to the allegations and as to the facts proved, I so entirely go along with him in his view (with one exception, indeed, with which I am about to qualify my assent), that it is unnecessary for me long to detain your Lordships.

My Lords, in the first place, with respect to the preliminary objection which was taken at the bar, which appears to me to have no force, I wish to state that I am not for reversing this decree in respect of that preliminary objection; I mean the objection that both actions were not competently before the Court when they gave their judgment. My Lord Fullerton uses a very strong expression (I think it is at the top of a right-

hand page in his judgment), and upon that expression of Lord Fullerton, in his most able judgment, the argument for the Appellant at the bar has been principally rested.

My Lords, I do not think it is necessary in support of the judgment below, or in support of our affirmance of that judgment, to say that the effect of a reclaiming petition was to bring both actions before the Inner House as if they had been conjoined. Conjoining two actions is *pars judicis*, as is often said in the Scotch law and practice, and therefore I am unwilling to say what the effect of a reclaiming note is, and whether that might be supposed to supply the defect of an interlocutor conjoining the two. It is quite unnecessary to state that, because I think this is fatal to it, which my noble and learned friend has already remarked, and upon which I rest my opinion as being a sufficient ground in itself, that this was not objected to at the proper time and place. This objection ought, past all doubt, to have been taken in the Court below, where it was not taken; and whether the reclaiming note had so large an effect or not, at all events the reclaiming note brought both interlocutors (as I understand) before the Inner House; and with the reclaiming note the Court had to deal. The reclaiming note was the ground upon which the Court were called upon to decide; it was upon the reclaiming note that the judgment proceeded. Then I say that it is quite enough for me, in order to enable me to dispose of this merely technical objection to say that it was not taken at the proper time and place.

My Lords, the next point that was made in this case raised a doubt with respect to a decision of this House in a case which I heard, and in which I moved your Lordships to give judgment, reversing the decision of the Court below, the case of Mc Donald *v.* Mackie, to which my noble and learned friend has alluded, and to which I have had an opportunity of referring both during the argument at the bar and subsequently. There

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is no doubt whatever as to that decision, and I hold by that still, and there can be no doubt whatever that it cannot be shaken. It was an appeal from the Court of Session, the pursuer having stated the facts on which he founded in his summons and condescendence. I go along with my noble and learned friend in his praise of the able statement of my Lord Murray in his valuable tract upon the subject. I go along with him in greatly regretting that the summons and condescendence separate the two matters; that the summons is partly writ and partly declaration, and the condescendence supplies what is wanting, and that without having the condescendence *plus* the summons, you do not see the whole of the pursuer's case. I greatly regret that the summons should not be a mere writ, and the condescendence a declaration. It is much better to keep the two apart; but be that as it may, the mere writ bringing into Court is not the office of the summons. It goes a great deal further. In that case, it was held that the pursuer having stated the facts upon which he founded in his summons and condescendence which brought the whole case into court, and which the defenders had lawfully and explicitly answered, it was too late for them to deny the relevancy of the facts. Therefore the case was remitted to the Court of Session with instructions; because after you have pleaded issuably upon the merits, it is too late to demur generally. In my observation I therefore say, "In the first place their Lordships have mistaken "the shape in which it was brought forward; secondly, they "have mistaken their office in dealing with the answer and "the condescendence at that stage; and last of all, even if they "had been right in the period of time, of so dealing with it, if "it had been a motion in arrest of judgment, or a motion for "entering up judgment *non obstante veredicto*, or an argument "upon demurrer, yet in the third place they have confounded "two utterly distinct subjects of consideration, namely, the "question of law whether or not the pursuer's averment

"amounted to a claim in law, with the question of fact, whether "this averment was true or not?" There can be no doubt how to deal with a case of that sort. But it does not affect this case in the smallest degree, and no support can be gathered for the Appellant's contention in this case from that undoubted position.

As to the third technical point also, I entirely concur with my noble and learned friend.

Now, my Lords, we come to the argument upon the merits. There is a very great difference, as my noble and learned friend has pointed out, between a matter executory and a matter executed. Thus, for instance, if you have a bill for a specific performance, much less misrepresentation and fraud may be necessary to answer that bill, and to call upon the Court to refuse to decree specific performance, than would be required after the execution of the contract to set it aside. After the contract is executed, it would require a great deal more stringent proof of fraud, *dolus dans locum contractui*, to set aside an executed contract than would be required to prevent specific performance, if the matter had rested *in fieri*, and had been executory merely.

That was very distinctly stated in a celebrated case in this House, celebrated on account of the length of the litigation and its importance, and also on account of the eminence of the parties; namely, Harris *v.* Kemble, which was heard by Lord Plunkett, and Lord Eldon and myself, I think, in the year 1831. In that case that principle was very fully illustrated. But it is a matter past all doubt, and requiring no further argument or consideration.

But here was a contract executed. Mr. Burnes had purchased the shares, and he resists the calls made upon him by force of that contract. Under these circumstances, it would require a very strong case of fraud,—it would require not merely a general averment that there had been irregular conduct on the

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part of the directors,—not only a general averment that they had behaved trickily (if I may so speak), but there must be legal fraud; it must be *dolus dans locum contractui.* It is not enough for a man to say, "If you had not given such an appearance of the flourishing state of affairs,—if you had not, by paying dividends out of capital, and by making the public believe that you were paying them out of profits, given this flourishing appearance to the concern by your own acts and deeds, I should not have bought my shares." That I say is not enough. You must show that there has been some specific fraudulent contract on the part of those directors,—some grossly fraudulent conduct which gave rise to the particular contract in question. It is not a general averment of *dole.* It must be *dolus dans locum contractui.* That is the language of the civil law which all nations have followed, and the general principle of which in all matters of personal contract is the law of all Europe at this moment. Now here there is no averment of any such fraud as that; and as my noble and learned friend has well pointed out, if there had been such an averment, there is a failure of truth; because, take the instance of the 1500*l.* which was paid, and of the 700*l.* afterwards, both these dividends were paid out of the premiums. It will not do to say, "If you had set down the premiums on the one side and the losses on the other, the gains and the losses would have so counterbalanced each other, that, striking a balance between the two at that particular moment when those two dividends of five and seven per cent. were declared, they could not have paid them out of premiums." That is not enough; that is not sufficiently fraudulent conduct, happening before the contract, and not connected in any way with the contract, to vitiate the proceedings to which the party may be said to have been so induced.

My Lords, to illustrate the proposition that it is not every false representation by acts and deeds, whether by the conduct

of an owner of property, or by the conduct of a body such as a railway company, represented by the directors, that would vitiate any contract that may be made, because those false representations by the proprietor or by the Company may be said to have supplied a motive for the party contracting with them. To illustrate that proposition, I will put this case. But, first of all, let me say that I beg to be understood as entirely going along with those who view with the greatest severity the conduct of railway directors in declaring dividends to be paid out of capital, because I consider that that is of itself a most vicious and fraudulent course of conduct. It is telling the world that their profits are large, when it may be that their profits are *nil*, or that their losses are large, with no profits. It is a false and fraudulent representation by act and deed, much to be reprobated; and I go the full length of what my noble and learned friend has laid down, that it would be a just ground, if a course of conduct of this sort were pursued, coupled with such circumstances as clearly to show a fraudulent intent, for proceedings of a graver nature against these parties. I entirely go along with my noble and learned friend in that proposition, as well as in the illustration which he made use of; namely, that there was a clear ground in law for indicting my Lord Dundonald, then Lord Cochrane, and his relative, Mr. Butt, and others, for a conspiracy, but that the verdict was wrong; because I think the verdict was not borne out,—I mean so far as Lord Cochrane was concerned. Mr. Johnson fled, and there is no doubt that he was guilty; but Lord Cochrane and Mr. Butt, in my opinion, were not guilty, and they were erroneously convicted. I was counsel in the cause, and therefore I may be said to have viewed it with prejudice at the time; but I have since fully considered it; and I was one who gave the advice to His late Majesty to restore Lord Cochrane to his rank, as having been erroneously convicted. I never should have given that advice to my Sovereign, notwithstanding the illustrious services of that noble Lord,

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if I had not believed that he had been wrongly convicted. But that there was in law a conspiracy for which a judgment of an infamous nature might pass upon the parties who were guilty in point of fact, I have no doubt any more than my noble and learned friend.

But, my Lords, I was just going to illustrate the point by this case. Suppose that a landlord, in order to make it appear that his tenants are very flourishing, and that his estate is very valuable, remits privately rent to his tenant;—suppose he enables that tenant to live very comfortably, and even luxuriously, in a comfortable farm-house;—and supposing all the while that this is owing to his remitting the rent, and perhaps even out of his capital doing something more for his tenant;—and suppose that in consequence Lord A's or Sir John B's tenants are supposed to be very flourishing, and his estate to be very valuable;—and suppose the consequence of that is that after they have got this name in the world for five or six years, a man comes forward and bids for the estate, or a tenant comes forward to bid for and take the farm, it would be a very strong case to say that this little manœuvre of the landlord to make things appear comfortable and better than they really were, would be such a fraud as would entitle the tenant who had taken the farm, when he was called upon to pay his rent, to say, "Oh, it was all owing to my seeing my predecessor in such comfortable circumstances that I was induced to become your tenant; therefore I will not answer your call—(the rent being in the nature of the call here).—I will not answer your call for my instalment,—my next half year's rent. It is a fraud you have committed; and, therefore, though I have executed the contract, you have yourself to blame." I do not know if there were a bill for a specific performance of a lease which had not actually been taken by the tenant, how far that would be an answer to that bill, but I am confident that no court of equity would set aside a contract or a lease which had been executed under those circumstances.

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My Lords, upon the remaining parts of this case, my noble and learned friend having so elaborately argued them, I do not think it necessary to dwell. I agree entirely in the conclusions at which he has arrived, and I am of opinion, first, that there is no such fraud relevantly alleged as would be a sufficient answer to the action: and, secondly, that there is a total absence of proof of such fraud as would entitle this party to have this contract set aside. I therefore entirely agree with and support the motion of my noble and learned friend.

It is ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of be, and the same are hereby affirmed. And it is further ordered, That the Appellant do pay, or cause to be paid to the said Respondents, the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk-assistant. And it is also further ordered, That unless the costs certified as aforesaid shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

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CASES

DECIDED IN

THE HOUSE OF LORDS,

ON

APPEAL FROM THE COURTS OF SCOTLAND.

SESSION OF PARLIAMENT 1850.

VOL. VII.

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DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

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1850.

[HEARD 14*th*—JUDGMENT 21*st February*, 1850.]

THE MOST NOBLE ALEXANDER DUKE OF HAMILTON, *Appellant.*

The MAGISTRATES and TOWN COUNCIL of the Burgh of Hamilton, *Respondents.*

Kirk.—Where parties have for a long time past the years of prescription and enjoyed possession of seats in a parish church, under some title or other, not plainly discoverable, it is not competent to dispossess them, at making a new distribution of the seats after a mere repair and reseating of the church.

IN 1456, the town of Hamilton was erected into a Burgh of Barony. In 1543, it was created a Royal Burgh, but having lost some of its privileges as such, *non utendo*, it was in 1670 created into a Burgh of Regality by a Charter from the Duchess of Hamilton. In 1726, the Magistrates brought a declarator of their privileges and powers as a Royal Burgh in which a plea of prescription was sustained in favour of the Duke of Hamilton,

as to the way of electing the Magistrates and Council: Thereafter the Burgh was governed until the passing of the Reform Act in 1833, under the Charter of the Duchess of Hamilton, 1670.

The parish of Hamilton is partly burghal, and partly rural. In the year 1791 its population was 3601. In 1821, the population had increased to 6000, and at the last census, it had still further increased to 10,854, of which latter number 8,875 persons resided in the burgh, and the remaining 1979 persons in the landward parts.

There is only one church for the whole parish. In 1451, this Parish Church was made Collegiate, and at that time James Lord Hamilton, built a new one, which continued to be used till the year 1732, when it was pulled down in order to improve the Duke of Hamilton's Park, and a new church, with the exception of the seating, was built by the Duke in another situation.

In 1475, the Magistrates of the Burgh had obtained a grant from Lord Hamilton of 100 acres of ground within the Burgh, which they have ever since held under his Lordship's successors, the Dukes of Hamilton. Thirty acres of this land have been feued by the Magistrates for building purposes, and the feu duties they thus derive amount to about 400*l.* per annum.

The valuation and cess of these lands were never entered separately, but always continued to be entered on the cess-roll in one cumulo valuation with the other lands of the Hamilton family, but whether the Magistrates were assessed to, or paid any of the parish or public burdens in respect of these lands was a disputed matter between the parties, and on which side the truth lay, did not appear. What portion of the Parish Church was enjoyed by the predecessors of the Respondents in ancient times, and whether as heritors or as Magistrates, does not either appear; but that they did possess some part is to be inferred from entries in the town accounts from 1703 to 1733, of receipts of "the rent of three back seats in the town's loft in

" the church," some of the entries calling the loft " the Magis-
" trates' loft," " the Council's loft," and sometimes the "Town's
" loft;" and the records of the burgh contain this entry, of date the 9th of May, 1734:—" 'His Grace the Duke of Hamil-
" 'ton having promised to give to the bailies the loft in the
" 'south-east aisle in the kirk, upon their being at the charges
" 'of laying the floor thereof, and building the breast or front
" 'of the same, they do, therefore, appoint John Hendry, their
" 'treasurer, to cause measure the said floor, and calculate what
" 'deals it will take to lay the same, over and above the timber
" 'of the old lofts belonging the town, presently lying in the
" 'Meal Market, and immediately to provide the said deals,
" 'that they may be seasoned in due time.' Again, in the
" minutes of 7th September, 1734, 'the bailies approve of the
" 'payment of 5*l.* sterling, as the price of 80 Frederickshall
" 'deals, for the town's loft in the new church.' And the
" minutes of 26th April, 1735, bear, that the Council having
" seen a letter 'to Bailie Naismith from John Hamilton, one of
" 'the Duke of Hamilton's commissioners, desiring that they
" 'would, upon their own charges, build a stair to their gallery
" 'in the new church, and John Hendry, treasurer, having
" 'informed them that he had, this day, taken the advice of
" 'workmen anent the building of the said stair, and that they
" 'were of opinion that the timber of the stair to the town's
" 'gallery in the old church, will again serve to build the most
" 'part of the said new stair, they, therefore, agree to build the
" 'same on the town's charges, &c.' And finally, the minutes
" of 20th September, 1735, bear that 'the bailies and Council
" 'approve of an account of wright work, and others, wrought
" 'at the town's aisle of the new church, and authorize payment
" 'thereof.' "

The evidence upon the subject for the period subsequent to the building of the new church, was a little more precise, for the minutes of a meeting of the heritors held on the 11th of

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October, 1734, had the following entry:—"John Hamilton, "Writer to the Signet, in the name of James Duke of Hamilton "and Brandon, did represent to the foresaid heritors, that the "new church of Hamilton, being now mostly furnished and "sclated, that it was his Grace's inclination that the same "should be proportioned and divided amongst the rexive "heritors of the said parish, according to their rexive valua- "tions, that so no time might be lost in finishing the gallarys "in terms of a modell to be laid before them, and likewise the "seats in the area of the church; and since the Duke did not "insist to have his proportion in the church according to his "valuation, he desired there might be so much of the area of "the church set aside for his tennents as would conveniently "hold them; which being considered by the heritors, they "agree that the valuation be the rule both for divideing the "gallarys and area of the church; and having considered a "valuation-book of the said parish, they find the heritors "following to have the greatest valuations, viz.—the Duke of "Hamilton, who is to have the south-west isle for himself, and "the area below for his servants; and out of the said Duke his "proportion effeiring to his valuation, he agrees that the "Magistrates and Town Councill of Hamilton shall have the "gallary of the south-east isle."

The minutes of another meeting of a Committee of the heritors, held on the 18th February, 1735, bore that a person who had been employed to measure the area of the church reported "that, 'exclusive of the Duke of Hamilton's gallery, "'and servants' seats behind the same, and also exclusive of "'the common area within the circle, and the common pass- "'ages, both above and below, the whole contents of the church "'extended to 2,605 feet; and the gallery in the south-east "'aisle, which Mr. John Hamilton, one of the Duke's commis- "'sioners, declared his Grace was to give to the Magistrates "'and Town Council of Hamilton, out of his valuation, amounts

" ' to 303 feet—which being deducted from the above 2,605
" ' feet, there remain 2,302 feet; and it being declared, in the
" ' name of his Grace, that he was not to insist for his whole
" ' valuation, but wanted that a proper place be set apart for
" ' his tenants, Robert Strang proposed that 197 feet of the
" ' north-west gallery, besides a proportional part of the common
" ' area below, be set apart for that purpose.' "

In the proceedings to be presently noticed, the Respondents averred, and the averment was not substantially denied, that the Magistrates and Council of the burgh, after the arrangement of 1734 and 1735, got allotted to them the south-east gallery of the new church which was then built, and that they floored, plastered, and made a stair to it, and had ever since possessed and enjoyed it. That the seats in this "new church then built " were principally the same as had been used in the old church " by the respective parties who had sittings in it."

In the year 1841 the heritors directed a survey of the church to be made, with a view to ascertaining what repairs were necessary. The persons appointed for this purpose reported that the walls were sound, but that the wood-work of the galleries was decayed; that the arrangement and construction of the pews were very bad, and many of the pews would require to be renewed:—" The whole area will therefore require " to have new flooring and sleepers laid at a higher level than " the surrounding ground; and the seatings will, consequently, " require to be taken out, and replaced, which ought to be done " upon a better construction."

The Presbytery on the 9th of June, 1841, approved of this report, and decerned in terms thereof, " and instructed their "clerk to furnish the heritors with an extract of their minute, "and" enjoined the heritors to take immediate steps for executing the repairs.

The repairs and alterations reported as being necessary were effected under the authority of the heritors at various

meetings of the body, and the expense of the repairs was defrayed by the same body.

At length in February, 1843, an application was made to the Sheriff by the general body of heritors, who had taken part in the repairs, setting forth "That, in order to avoid all dis-"putes, and judicially to determine the respective proportions "of the area-seats and sittings of the building effeiring to the "heritors who have contributed under the aforesaid assessment "towards the expense of the said improvements and repairs, "the petitioners craved the Sheriff to divide and allocate the "sittings in the church according to law," and praying the Sheriff to "make a division and allocation of the sittings in the "galleries and area of the said church, by decree of Court, "among the several heritors, according to the valued rent of "their respective lands upon the cess-roll of the parish, and "the ministers of the said parish, conform to their respective "rights and interests, all in terms of law." Service and intimation of this application was ordered and made, and thereafter on 9th February, 1843, the Sheriff appointed the 6th of April for making a division and allocation of the sittings of the church.

The Respondents, though heritors of the parish in respect of the 100 acres before mentioned, which they had originally acquired under tithes from the ancestor of the Appellant, were not invited or summoned to take any part in the resolutions with regard to the making of the repairs; neither was any service made upon them or intimation given to them of the application to the Sheriff or of his order for allocation and division of the sittings; neither were they assessed for any part of the expense of the repairs.

The Respondents, however, were of course aware from time to time of what was being done. At length they, on the 17th November, 1842, wrote to the Appellant's factor in these terms: —"You are aware that the Magistrates and Council have had,

"since the church was built in the year 1734, a front gallery "and sittings behind. If it is not intended that they should get "the same sittings and front seat which they formerly possessed "prior to the church being repaired, which it is expected they "will, I should like to be apprized of such intention before the "division takes place;" and no notice being taken of this letter, they served a protest upon the Appellant, in which they intimated to him that they "had a right to the gallery in the "south-east aisle," and claimed the same, and protested against its being allocated to any other heritor; "First, because the "church having been formerly legally divided, and the south-"east gallery allocated to the Magistrates and Town Council "of Hamilton, upwards of one hundred years ago, and which "had since been possessed by them, as their own exclusive "property, it was illegal again to divide the church, which had "been recently merely repaired; and, second, assuming the "proposed division to be legal, the Magistrates and Town "Council of Hamilton, in respect of their property, the valua-"tion of which is included in that of the Duke of Hamilton's "valuation, and of the rights acquired by them, at the division "of the church in 1734, are entitled to 303 square feet of the "area of the church for sittings therein."

The Duke, in answer to this protest, denied the right asserted by the Respondents; but nevertheless he said that, following the example of his predecessors, he was willing, out of his own allocation, to accommodate the Respondents, and he proposed with that view to give them certain seats which he specified.

On the 6th of April, in the absence of the Respondents, the Sheriff made a new division of the sittings of the church, by which he allocated to other heritors the whole of the gallery which had previously been possessed by the Respondents, and set aside no part of the church for them, leaving them to be accommodated out of that part which was allocated to the

Appellant, and which they were informed would consist of three specified seats.

The gallery which had been possessed by the Respondents had afforded accommodation for seventy-six persons, and according to the new seating was capable of accommodating seventy-five persons, whereas the three seats which the Appellant proposed to give them, were equal to the accommodation of only nineteen persons.

The Respondents now presented a note of suspension and interdict to the Court of Session, against the Appellant and the heritors to whom the seats in the south-east gallery had been allocated, by which they prayed that Court to "prohibit and "discharge the said Respondents, by themselves, or by their "tenants, servants, or others acting in their name or on their "behalf, or by their permission and authority, from entering to, "or taking possession of, or occupying the seats in the south-"east gallery of the parish church of Hamilton, which, for "upwards of one hundred years, have been exclusively occu-"pied and possessed by the Magistrates and Town Council "of Hamilton, both *qua* such and as heritors within the parish, "and which were specially allotted and set apart to them "in the original division of the said church—and also from "interfering with, interrupting, or molesting the complainers, "in any manner of way, in the peaceable possession and enjoy-"ment of the said gallery, and sittings or pews therein."

At the same time the Respondents, for themselves, and as representing the commonalty of the burgh, and as heritors of the parish, brought an action of reduction and declarator against the general body of heritors, concluding for reduction of the Sheriff's decree and scheme of division of the seating of the area of the church, and for declarator that the Respondents, "as the Magistrates and Town Council of the burgh of "Hamilton, representing the community of the said burgh, "and, as such, heritors within the parish of Hamilton, have

" the only good and undoubted right to the gallery in the " south-east aisle in the present parish church of Hamilton, " and to access by the stair leading thereto, and that they are " entitled now and henceforward, in time coming, exclusively of " all others, to possess, occupy, and enjoy the same, as they " did before the date of the said alterations and repairs, and " without let, hindrance, or impediment from the Defenders, " the Duke of Hamilton, Thomas Jackson, and John Hamil- " ton, or any others whomsoever: And the said church OUGHT " and SHOULD, by decree of the said Lords, to be divided " between the Pursuers and the Defenders according to the " state of their rights and possession previous to the repair of " the church, and, for that purpose, the said Lords OUGHT and " SHOULD nominate and appoint the Sheriff of Lanarkshire, or " one or other of his substitutes, to obtain a correct plan of " the area and galleries of the said church, and the seats therein, " and thereafter to allocate and set apart the gallery in the said " south-east aisle for the Pursuers, and otherwise to divide the " area and remaining galleries, and seats therein, amongst the " Defenders, and allocate the division of them according to the " state of their rights and possession previous to the repair of " the church, and to cause number the seats so to be divided " and allocated, and to obtain a proper and correct scheme of " division, containing the names of the parties and the numbers " of the seats allocated to them, care always being taken by " him that there shall be allocated to each accommodation " equal in point of situation and dimension to that which they " possessed previous to the said repair, so as to ascertain and " fix the proper rights and limits of the rights of each in time " coming, all to be reported in due form: And the said Lords, " by decree foresaid, OUGHT and SHOULD ratify, approve of, " and confirm the said scheme and division, and report on the " same being found correct, and the respective divisions and " allocations, so made and approved of, OUGHT and SHOULD be

" DECERNED and ORDAINED, by decree of the said Lords, " to belong to the Pursuers and Defenders respectively, and " their respective successors or heirs, to be possessed and " enjoyed by them, as their distinct property, in time coming."

The actions of reduction and declarator, and of suspension and interdict were conjoined, and in support of them the Respondents stated, *inter alia*, the following pleas in law.

" I. As the Magistrates and Councillors of the burgh of " Hamilton, and as heritors of the parish, the Pursuers have " a legal right of property in the parish church, and are entitled " to suitable accommodation therein.

" III. The decree of division was incompetently pronounced, " and is illegal, inasmuch as the Pursuers were not cited or " called, for their interest, in the process of division, either as " Magistrates and Councillors, or as heritors.

" IV. The pretended decree of division is, *quod* the Pursuers, " a decree in absence, and ought to be suspended *simpliciter*.

" V. When a parish church is taken down, and a new " church is built in place or instead of it, the Magistrates and " Town Council of a burgh, within the parish, and the heritors " of the parish, are entitled to have allocated to them, in the " new church, equal accommodation, in point of situation " and dimension, to that which they possessed in the old " church.

" VI. The Magistrates and Town Council of Hamilton " have right to, and are entitled to occupy and possess, the " gallery of the south-east aisle of the present parish church of " Hamilton, in respect both of the right of property which " belonged to them as Magistrates and Councillors, and as " heritors in the former parish church, and of the agreement " with the Duke and heritors in 1734, by which that gallery " was assigned and allotted to them, as an equivalent for the " gallery which belonged to them, and which they had occupied, " in the former parish church—more especially as their title to

"the right and possession claimed by them is fortified and "rendered unexceptionable by acquiescence and prescription.

"VII. Where a party at the original division of a parish "church, by agreement with the patron and heritors gets "allotted to him a certain proportion and place of the church, and "afterwards possesses, with the acquiescence of the patron and "the heritors—more especially if the possession be for more than "forty years—it is incompetent for a sheriff to invert his pos-"session; and he is entitled to continue in his place, and to "possess, even although the space exceed the accommodation "to which he is entitled, with reference to the extent of his "lands in the parish, or the amount of his cess and valuation.

"IX. Even on the assumption that there was a necessity "for a re-division, and that it was legal to invert or encroach "upon the possession of the Magistrates and Town Council, the "Pursuers were entitled to get equivalent, suitable, and com-"fortable accommodation of space and sittings, in an equally "eligible situation in the gallery or area of the church, cor-"responding to the former possession.

"X. In the division of a church amongst the heritors of a "parish which is partly burghal and partly landward, the Magis-"trates of the burgh are entitled to have allotted to them a "reasonable and fair proportion of the church, with reference "to the state of the population and circumstances.

"XI. The Defenders have no legal right of property, either "collectively or individually, or by one or more of their number, "in the seats of the gallery of the south-east aisle of the church, "illegally taken possession of by them, and allocated to the "Defenders, the Duke of Hamilton and Messrs. Jackson and "Hamilton, by the said decree, or any right to occupy the "same."

On the other hand, the Apellant stated, *inter alia*, the following pleas in law.

"III. Even if the decree of division were reduced, the

" remaining conclusions are incompetent, inasmuch as any new " division of the area of the church would fall to proceed before " the sheriff in common form.

" IV. Even if the Pursuers, *qua* heritors, were entitled to " challenge the decree of division, to the effect of having a por- " tion of the area of the church set apart to them effeiring to " the valuation of their property, they are not entitled to be " heard in the reduction without paying the whole expenses of " the process of division, as well as those incurred in this " process, in respect, (1.) That they never did claim in that " character, and to that effect, but as having a separate and " exclusive right of property in the gallery: (2.) Because, " though in the full knowledge of the proceedings, they made " no claim merely to a portion of the church effeiring to the " valuation of their property: and, (3.) Because they never " tendered, and never have paid, one farthing of the expense " of the alterations and repairs of the church. Separately— " The Respondents, against whom the suspension is directed, " are entitled to the expenses incurred by them in that suit, " which could, in the circumstances, be of no avail, all parties " interested not having been called.

" V. The Pursuers have not, as Magistrates of the barony, " or otherwise, instructed any right or title to the gallery claimed " by them, and consequently, they are not entitled to decree, " either of reduction and declarator, or of interdict, as craved.

" VI. The alterations, improvements, and repairs, made by " the Respondents on the church, were, in reality, equal to the " erection of an entirely new church—and a new division of the " area, according to the respective valuations of the lands of the " several heritors, was rendered absolutely necessary; and, at " all events, the Pursuers are barred from now, for the first " time, taking that objection to the division.

" VII. The proceedings in the process of division were, in " all respects, regular and competent; and the church of

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" Hamilton being exclusively a landward parish church, and no " part of the expense of its erection or repair having been " assessed on the inhabitants, or tendered by the Pursuers, as " representing them, the Pursuers have no right or title, by " virtue of their office, to a share of the area.

" VIII. As the Pursuers do not stand rated, either in the " cess-rolls of the county of Lanark, or parish of Hamilton, " as heritors—and as they have never contributed towards " payment of any of the parochial burdens—they could not be " specially made parties to the proceedings in the process of " division of the church.

" IX. Any use or possession which the Pursuers, and their " predecessors in office, have had of a portion of the area of the " parish church since 1734, was not in virtue of any legal right " or title pertaining to them, either as magistrates or heritors, but " *ex gratiâ* of the family of Hamilton only, and out of that portion " of the area of the church allocated to the Hamilton estates.

" XI. Moreover, no arrangement, such as that of 1734, " between the Duke of Hamilton, as proprietor of the dukedom " and entailed estates of Hamilton, can affect either the rights " of his Grace's successors in the entailed estate, or the other " heritors in the parish, when a new division of the church has " been rendered necessary."

Cases by the parties were ordered by the Lord Ordinary, and given into the Court (2 Division), and thereafter on the 24th of June, 1846, the Court pronounced the following interlocutor which was the subject of the appeal:

" In the process of reduction and declarator, sustain the " fourth reason of reduction, and reduce and set aside the decree " and scheme of division pronounced and approved of by the " Sheriff, of date the 6th day of April, 1843, sought to be " reduced, so far as relates to the allocation and appropriation " of the gallery of the south-east aisle, of which the Pursuers " were in possession prior to the repairs and alterations recently

" executed in the interior of the church; and find and declare " that the Magistrates and Town Council of Hamilton have the " only good and undoubted right to the gallery in the south- " east aisle in the present parish church, and to access thereto " by the stair leading to the same, and are entitled to possess, " occupy, and enjoy the same, as heretofore, without molestation " or hindrance from the Defenders, or any of them; and reduce, " decern, and declare accordingly: And in the process of sus- " pension and interdict, in respect of the judgment in the process " of reduction and declarator, interdict, prohibit, and discharge, " as craved: Find the Pursuers entitled to the expenses incurred " by them, with the exception of the expenses in the Bill- " Chamber: Allow an account to be given in, and remit to the " Auditor to tax the same, and to report."

Mr. Bethell and *Mr. Wortley*, for the Appellant.—There is no evidence of any original right to the seats in the parish church claimed by the Respondents other than what they derived *ex mera gratiâ* of the Appellant's predecessors, which they or he were at any time entitled to recal. The very title of the Appellant and his predecessors, which has been that merely of heirs of entail, prevented the possibility of the gift by them to the Respondents being of an absolute indefeasible nature; they could not have made a gift of the part of the church to which they were entitled in respect of their lands any more than they could have made a gift of part of the lands themselves. The gift would in the one case as much as in the other have inferred a breach of the entail, with its consequent forfeiture, for the seats of the parish church go along with the lands to which they are allocated *Dunl: Par. Law*, p. 42. Such an act with such a consequence will not be implied, but must be established by conclusive evidence, and such evidence being wanting, the gift must be held to partake of the quality and character of the tenure of the donor.

Such being the case, the gift was at an end when that which was given ceased to exist. The repairs of the church made an entirely new state of things, and restored the rights of parties to their original condition. An entirely new allotment being necessary, it rested with the Appellant whether to repeat or refrain from the generosity of his ancestors, and any claim upon him by the Respondents as a matter of right was out of the question.

The area of the church of a landward parish belongs to the heritors before division in one common right; and when the division is made, it is according to their respective valuations; and from the time of division each heritor has an individual right in the particular portion allocated to him. But so soon as a rebuilding or repairing of the church disturbs or destroys the allocation, the respective rights of the heritors become again merged in one common right to be again divided and ascertained as to each individual, according to their respective valuations, as they may exist at the time of division, after the changes of property which may have occurred subsequent to the previous division, and without any right in each heritor to the portion of the area which he may have previously enjoyed (*Ersk.* iii. 6, 11, *Wemyss Morton*, 16 *D. B.* and *M.*, 332).

In the present instance, the repairs of the church obliterated the seating of the church as it had previously existed, and parties were remitted to their original rights, and so the Respondents, owing the enjoyment they had hitherto had to the bounty and grace of the Appellant and his predecessors, had no right which they could set up to take any part in the new allocation. Accordingly, though the proceedings taken in regard to the church were notorious to them as they were to every other person in the parish, they neither took nor claimed a right to take any part which would infer a responsibility. They did not assert any right to assist in the deliberations as to the propriety of the repairs, or as to the mode or extent to which

they should be made. It was only at the eleventh hour when the division was about to be made, that the idea occurred to them of putting forward a claim to a share, shewing thereby the apprehension which they themselves entertained of their own position and rights.

And even when they did then make a claim to the particular gallery, it was not as heritors, but in respect of some supposed claim upon the Appellant as an individual heritor.

Nevertheless the conclusions of the summons assert as against the general body of heritors a right to a particular portion of the church, and a new division of the area of the church, according to the rights of parties previous to the repair; a demand which is obviously inconsistent with the rights of the other heritors; for, as already observed, when the state of the previous possession is destroyed by repairs or rebuilding, the parties are remitted to their original rights. No heritor can claim any particular portion of the area. All he has right to is an unascertained undefined portion.

Possession then, for however long a period, cannot be of any service as a title of possession, either as against an individual heritor or as against the general body of heritors, for any contract which might be implied is necessarily at an end so soon as the new division and allocation take place. And so far as regarded the Appellant, the possession, such as it was, was not adverse to him, but, on the contrary, was under him, and consistent with his titles.

Mr. Rolt and *Mr. Anderson* for the Respondents.—The rule for the division of the area of a parish church, though not laid down in positive precise terms, in the authorities for the law of Scotland, seems to be pretty much the same as that stated by Sir J. Nicholl in Fuller *v.* Lane, 2 *Add.* 419: That by the general law and of common right, all the pews in a parish church are

the common property of the parishioners, who are entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The parishioners indeed have a claim to be seated according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of all the parishioners to be seated, if sittings can be afforded them. This is fairly the result of the decided cases in Scotland, and of the different passages in the text writers, which all admit the principle, and only raise discussion as to the particular mode in which it is to be worked out. *Ersk.* ii. 1, 8, says, Though churches fall not under commerce, because a church is the house of God, the heritors and other inhabitants may nevertheless acquire a *quasi* property in the seats of a church limited to the special purpose of attending divine service.

Where the parish church is entirely landward, it has been assumed that the population is equally extended over the whole parish; and that if the area of the church be divided according to the proportion of land held by each heritor or proprietor, the spiritual wants of the community in the parish will thus be provided for. But the portion of the area thus allocated to each heritor does not become his own private property, which he may dispose of as he pleases. He holds it merely as a pertinent to his lands, for the accommodation, not of himself and his family alone, but of his tenants and servants (*Ersk.* ii. 6, 11), to whose exclusion he cannot let or otherwise dispose of it (Skirving *v.* Young, *Mor.* 7930.

In this arrangement the vassals of a lord do not claim in a subordinate degree to him, and are not dependent upon the subdivision to be made by him for their portion of the area—they claim and have allocated to them a portion in their own original right as heritors.

Where the parish is not entirely landward, but partly burghal and partly landward; where there is within the parish a town having within it a number of inhabitants greatly

exceeding what is to be found in any corresponding area of the parish, the rule of division, viz., the accommodation of every parishioner, is still recognized, but the mode of working it out is different. To apportion the area according to the extent of land possessed by each heritor would obviously leave many of the inhabitants of the town unprovided with church accommodation. In Ure *v.* Carnegie, *Mor.* 7929, the Court found that the area of the parish church of Forfar fell to be divided between the community of that burgh and the heritors of the parish in proportion to the population. But the other authorities do not show the exact rule of division in such a case; for the question raised has generally been in regard to the right of the community of a town or burgh to accommodation, or its liability for repairs, according to a state of possession dating from ancient times, the authority or origin of which has not been disclosed. In Sinclair *v.* Heirs of Kinghorn, *Mor.* 7918, it was found that the community of the burgh of Kinghorn was entitled to retain possession of that proportion (one-half) of the area of the church which was presently possessed by them, and that the heritors were entitled to retain the other half, each body dividing it among its members according to their rights. In Cathcart *v.* Weir, *Mor.* 7928, where the heritors complained that the community of the burgh of Greenock enjoyed more than their due proportion, according to valuation in the cess-books, the Court refused to allow a division, being of opinion that there was, from the long possession, sufficient presumptive proof of a proper and regular division.

Then as to liability for repairs of the parish church, it was found in Argyll *v.* Rowat, *Mor.* 7921, that the repair of the Church of Campbeltown must be at the expense of the heritors of the parish and of the community of the burgh. In Feuars *v.* Heritors of Crieff, *Hailes*, 892, that the repairs were to be borne by the inhabitants of the town and the heritors of

the parish rateably according to accommodation. And in Lockhart *v.* Lockhart, 10 *S. & D.*, 243, where the question regarded the repair of the manse, it was held that the magistrates of the Burgh of Lanark, as representing the community, were liable, along with the heritors of the parish, and in Gavin *v.* Trinity House, 4 *Sh.* 61, when the magistrates of North Leith proved long possession by the community of a certain portion of the area of the parish church, but were unable to show any grant or written title, it was held, the church having been pulled down and rebuilt, that the corporations were entitled to have the possession continued.

All these authorities plainly recognize the right of the community of a town or burgh to have accommodation in the parish church, without regard to the amount of valuation of the lands within the town or burgh, as compared with the lands in the parish generally, and that where there is proof of past possession by them, that possession is not to be disturbed.

In the present case there is evidence that the Respondents' predecessors had accommodation in the church which existed prior to that built in 1734, and that they had a gallery or loft in the church then built. The inference of law from these facts is, that the accommodation so enjoyed had been enjoyed from all time. The obseqious terms of the minutes of Presbytery, in 1734, expressed as if every thing were referable to the grace and bounty of the Appellant's predecessor proves but little more than that such was the language of the time in matters in which a person of his dignity was concerned, although having relation to questions of undoubted right. So slight a circumstance as that will not overcome the presumption of law, that the accommodation in the church which had been enjoyed was so enjoyed by right.

[*Lord Chancellor.*—If you begin your title with the church built in 1734, and the church was originally built in 1451 by the Duke of Hamilton, and part given to the Respondents,

then the evidence of title prior to 1734, gives no better title than the arrangement in that year.]

The onus is on the Appellants to show that Respondents did not acquire their possession in the way in which it would be acquired in a parish church as accommodation for the inhabitants of the burgh.

Whatever new arrangement might have been justified had the church been pulled down and rebuilt, and a new adjustment according to existing rights as they might have been altered in the lapse of time by sale or exchange of lands within the parish, there was no right in any one, where repair was all that took place, to disturb the previous possession.

But the proceedings show, that whether the possession was to be disturbed or maintained, the Respondents were not invited to take any part. They were passed over as parties having no right or interest in what was going on, although they represent the community of the burgh, who, through the Respondents alone, can obtain that accommodation in the church, which the law intends that all should have.

Mr. Bethell in reply. A parish church is not an easement but a tenement, to which a title must be established. If possession of a gallery adverse to the heritors be shown, and also a title to it, exclusive of them, the interlocutor appealed from may stand, not otherwise; but no title has been proved of any kind, beyond the mere bounty of the Appellant's predecessor, which he was entitled at any time to recall. Even if the Respondents, as representing the community, should be considered as entitled to any part of the area, that would not give them right to any specific portion of it, but only to an aliquot part to be selected by the competent authority; but the prayer of the suspension has regard specifically to the south-east gallery alone, and the proceedings show that the claim is made by the Respondents not only as representing the community, but as heritors.

DUKE OF HAMILTON *v.* MAGISTRATES, &c.—21st February, 1850.

LORD CHANCELLOR.—My Lords, the consideration of this case by the learned Judges of the Court of Session has led to an investigation which involves some questions of ancient and doubtful matters of fact and of law, in which there has been great difficulty in ascertaining some of the earlier facts which form the history of this case. It appears to me, upon considering the opinions of the learned Judges and the papers in these proceedings, that your Lordships may come to a very safe conclusion without any necessity for considering many of those points, or endeavouring to ascertain the accuracy of many of those facts. There appear to me to be facts about which there is no question, and rules in the law of Scotland respecting which there is no reasonable doubt, which enable your Lordships to come to a safe conclusion upon the matters in issue between the parties.

My Lords, it is hardly necessary to observe, that it appears from the proceedings that the noble family of Hamilton have possessed a preponderating influence in this parish not only from the station they hold, but as proprietors of by far the larger proportion of the parish. Therefore it may well be expected, certainly in earlier times, that we should find a want of that regularity in the proceedings which might be looked for in a parish where the influence and power of property was more balanced than it appears to have been in this one. But about one fact there appears to be no doubt, viz., that anterior to the year 1734, when the church, which has been lately repaired, was in fact rebuilt, rebuilt for the convenience of the Duke and at his expense (that of course cannot affect the interests or rights of parties in the subsequent building), the Magistrates, either as representing the community, or more likely as heritors themselves, had some interest in the allocation of the seats in the church. There is evidence sufficient to show that they had a loft in the former church. When that church was entirely

removed and a new church built, it became necessary to have a new distribution and allocation of the seats.

Now the Magistrates, neither as such, as representing the community, nor as heritors, appear to have intervened nominally in the transaction; but it is equally clear that they had a recognized interest in the old church, and that they had an admitted interest in the new church when built. For we find, in answer to the 11th Condescendence for the Duke, that this is stated:—"Admitted "that, in 1734, the new church was divided, and that, out of "the area set apart to the Duke of Hamilton's entailed lands "and estates in the parish, his Grace agreed that the Magis-"trates and Town Council should have the gallery of the south-"east aisle;" and "admitted that the Duke of Hamilton's "valuation included the valuation of the Pursuers' property, "which formed only a very small part in the valuation." Here, then, we have it admitted on the part of the Duke, and it is a fact which must be assumed to be the ground-work of any result which your Lordships may come to, that the Magistrates had an interest, which, unless it has been merged in the Duke's, and consented by them to be represented in the Duke's valuation, would have given them some title to intervene in the distribution of the seats in the year 1734. It is not at all a matter of surprise that they did not assert that important right, but that the Duke, who was the great proprietor, and under whom they held property, at all events under whose influence they were very much living, included their heritages in the valuation attributed to him. That could only have been done of course, reserving to them all such interest as they might derive from that property, whatever it might be, in the distribution of the seats. It shews, however, that the distribution of the seats, and the allocation of particular seats by the Duke to the Magistrates, was not a purely voluntary transaction. It was what was fair and proper;—it might have been more than they

otherwise could have claimed, but it was a result arising from the fact of their having permitted their property to be included in the valuation attributed to the Duke; and that is evidently the ground-work of the grant subsequently made by the Duke, and the consent given by them to the division of the property, and the seat which was reserved for the Magistrates. For we find in the extract of the minutes of the heritors of the parish of Hamilton, in the Appendix to the original case, "they agree "that the valuation be the rule for dividing the galleries and area "of the church, and having considered a valuation-book of the "said parish, they find the heritors following to have the greatest "valuations, viz., the Duke of Hamilton, who is to have the "south-west aisle for himself, and the area below for his "servants; and out of the said Duke his proportion effeiring to "his valuation, he agrees that the Magistrates and Town "Councill of Hamilton shall have the gallery of the south-east "aisle."

In the subsequent proceedings, that agreement is recited, and we find it speaks of "the gallery in the south-east isle, "which Mr. John Hamilton declared his Grace was to give to "the Magistrates and Town Councill of Hamilton out of his "valuation;" and so it proceeds, and the ultimate division proceeded on that ground, and that gallery was devoted to the Magistrates upon that footing.

Now that continued from 1734 until the time arrived for the repair of the church, which is the subject of the present dispute. We have, therefore, these facts, some title on the part of the Magistrates in the original church, a seat in the original church called the loft, the act of abstaining by the Magistrates from bringing forward their own claim, a permission by them that their property should be included in the Duke's valuation, an agreement by the Duke to appropriate to them a certain portion of what was allotted to him in respect of his share, and that agreement adopted by the heritors, and a distribution of

the seats, and amongst others this particular seat of the Magistrates, growing out of that transaction between the Duke and the Magistrates. We, therefore, have that which, beyond all doubt, constitutes a right in the Magistrates during the continuance of the old church. I do not find this to be a matter of dispute. Lord Moncreiff's opinion, which is contrary to the opinions of the great majority of the Judges, does not raise any question as to the title of the Magistrates to have that seat continued to them, so long at least as the old church remained.

Now, according to that fact, if it be so, the sole question remaining is, whether what has taken place does entitle the parties to a new distribution of the seats, or whether in allocating to particular parties the seats in the repaired church they were not bound to take the title to the former seats as the rule upon which the new distribution of the seats was to take place? About that no question is now raised. Lord Moncreiff disputes it, but, looking at the authorities referred to, it does not appear to me to be a matter of any doubt that in a repair of a church of this description, the title to the old seats governs the title to the new. There is no enlargement of the church, there is no intervention of other parties, no new interest to be considered, but there is merely the taking down of the old and decayed fittings-up of the interior and substituting new ones in their place. The very peculiar form and shape of this church also shows that there could not be, certainly not with reference to this particular gallery, any great difference in the location of the new gallery from that which existed in the old state of things. The question, therefore, is whether those who had an admitted title to seats in the gallery anterior to the alteration and refitting which has recently taken place have not thereby a right to similar sittings in the church recently fitted-up?

Now, if there had been a new church built, the circumstances would have been altogether different. But that is not the case we have to deal with. We merely have to deal with the ques-

tion whether the carcase of the church, the walls of the church, remaining the same, and the fittings up being renewed, that deprives a party of the title which he had in the old church before the old fittings were taken down; or whether he has not a title to the new seat substituted in the place of that which has been removed? My Lords, it appears that the Magistrates had an admitted and undisputed title in the old church, whatever may have been its origin, or however erroneous the principle of the original apportionment. I refer only to its origin for the purpose of showing that it is clear that it was not a gratuitous gift, or a mere permission to the Magistrates to occupy their seat, but that it was an arrangement between the Duke and the Magistrates, adopted by all the other heritors, growing out of the circumstances which I have before alluded to, that the Magistrates should have their seat-room recognized, though not as heritors, or parties intervening and claiming their own right, but although they did not appear as heritors, the right was conceded in that character. But, unfortunately, their not appearing as heritors has led to the present error, because if they had appeared as heritors they necessarily would have been parties before the Sheriff in the distribution and allocation of seats; but not appearing in that character, but as deriving their title through the Duke, who is the principal heritor, it appears that the giving of the seats to other parties has proceeded in their absence, they not being, in point of fact, parties to the new distribution, although in substance they ought to have been. Then the Magistrates came to the Court of Session, and complained that they had been deprived of their right to the seats. Unless the alterations of the church were such as to justify the Sheriff in overturning the arrangement, and disregarding the right which the parties had, whether that right was by gratuitous gift, or by dedication, or whether by allocation as parties entitled to the former seats, the Sheriff was not justified, under the circumstances, in depriving them

of their seats. Then the Court of Session has merely done that which justice required, viz., declaring that the parties claiming are entitled to the seats which they formerly possessed, and which the alterations of the church never justified the Sheriff in taking from them.

Then comes another question about which, however, Lord Moncrieff concurs with the other Judges, and as to which there does not seem to be any important difference, viz., whether it is right for the interlocutor to stop there, or whether it ought to proceed further, and give directions to the Sheriff. Now, it does not seem to be a matter in dispute that the Sheriff, after this declarator on the part of the Court of Session, will have to re-consider the course to be adopted, because the whole scheme is altered and affected by the declarator. He has, under an erroneous supposition connected with the rights of the parties, adopted a particular scheme, the purport of which is to deprive these Magistrates of their seats. But that being brought to his knowledge, and proper proceedings being adopted for bringing that before him, although there is no new general distribution of the seats in the church, yet there must be a certain degree of discretion in the Sheriff in fixing the identity of new seats, as representing the old seats. That seems to me to be established by the cases that have been referred to by the learned Judges as a proper proceeding to originate with the Sheriff; and the instruction which the declarator of the Court of Session contained upon that subject appears to me to be right. The result therefore is, that, although there are matters which if it were necessary to go into them would require considerable investigation before we could come to a conclusion as to the ancient law of Scotland upon the subject of the distribution of seats in churches under different circumstances; yet, that what appear unquestionably to be the facts of this case will not give rise to the necessity of considering these questions. Upon the facts which I have

already stated, your Lordships will, I trust, think it right to affirm the interlocutor appealed from.

LORD BROUGHAM.—My Lords, not having had the advantage of being present and hearing the whole of the argument in this case (I heard only the argument for the Appellant and part of the reply), I should have the greatest hesitation in propounding any opinion contrary to that of my noble and learned friend, who had the advantage of hearing the whole of it, even if I did not fully concur in the substance of what has fallen from him.

My Lords, it appeared to me, in the course of that part of the argument which I heard, that considerable misapprehension existed below in citing another case—it was the case of Peterhead. What we now say, however, is independent of that case entirely. But it does appear that considerable misapprehension existed below amongst some of the learned Judges respecting that case. I agree with Lord Moncrieff that that case does not govern this; it does not apply to this. And what we now say steers quite clear of that case.

I have one observation to make, my Lords, as to the way in which the learned Judges in the Court below have given their opinion upon the remit. When I inquired at the bar, during the argument, how it is done, it appeared that they hear all the counsel together, and then make up their minds apart. Then one learned Judge writes his opinion, with his reasons, and then what follows?—"I agree with Lord Robertson," says one. "I am of the same opinion as Lord Robertson," says another. "I entirely agree with Lord Robertson," says a third. Well, no doubt they do agree with Lord Robertson in opinion; but we have not the benefit of their reasons. There are Lord Robertson's reasons given; but we have not the great satisfaction of knowing that each of those learned Judges has applied his mind to the whole of the case, as Lord Robertson had

applied his mind to the whole of the case. That I do not complain of; but I notice it in passing, for it takes away greatly from the value, it impairs much the authority of the agreement and concurrence of the learned Judges, when one follows the other through the gap, as it were. They come to the same point, but they come through the gap made by the learned Judge who is the leader. Therefore it may happen—I do not know that it is so in this case—but it has happened to me to observe that a case has been cited by one learned Judge, the leader (if I may so call him); he says, "This case decides" so and so. The other learned Judges, one after the other, say "I agree" with such a learned Judge. And if he happens to have made an error in saying, "This case is on all "fours with the other," or "The other case decides this," all the others appear to agree in the error. Whereas it is a hundred to one if each learned Judge had given his own reasons for his opinion, that if the first learned Judge had made an error in the application of a case, he would have made that error alone; and the other three, if they had looked into it, would not have followed him in the error, but they would have said, "I agree, but I do not think the Peterhead case "applies," or "I agree, but I do not think the Kinghorn case "applies." The chances are very much against every one of the four falling into the same mistake in construing any particular case. Was not that so, Mr. Bethell, that they all agreed in that way in this case?

Mr. Bethell.—Yes, my Lord.

Mr. Rolt.—There were separate opinions of several of the Judges upon that point.

Lord Brougham.—Upon that point, but not upon the Peterhead case. That is just my argument. They agree with Lord Robertson; they give separate opinions upon the other points; but if he had made an error in the application of the Peterhead case, and if the others had looked into it each for himself, it is

contrary to the doctrine of chances that all four should make the same error severally; but it is very much according to the doctrine of chances, indeed, it is a certainty that the other three Judges, if they arrive at their agreement in that way, will agree with him in the error as well as in that which is right. I only notice this in passing, because we have often had occasion to regret that we had not the inestimable benefit of the individual opinions of the learned Judges in cases which have come before this House. One is exceedingly loth to impose additional labour upon these learned persons, but still there would be great advantage in having the full benefit of their very learned and very useful opinions. I know that many solicitors, when I was at the bar, made it a rule when they wanted the opinions of several counsel, to lay cases before each separately. I do not know whether since I left the profession, a change has taken place in this as well as in other things. They said, "We "will send the case to four learned gentlemen individually, and "then call them all together for consultation, after having got "their opinions separately." A very wise proceeding in my humble judgment, for then they had the benefit of each forming a separate opinion. Whereas they said, "If we call all four "together at the same time, one takes the lead in giving his "opinion, and the others are apt to follow. And we have in "fact only the benefit of the opinion of one instead of having "the benefit of the opinion of four." Now it is just upon the same principle that I have made the observation which I have now addressed to your Lordships.

My Lords, my noble and learned friend has put the case on grounds perfectly clear and satisfactory to my mind. If I had differed from him, it would have been with the greatest reluctance, not having had the advantage of hearing the whole of the argument, that I should have expressed an opinion. But I entirely go along with my noble and learned friend, with whom I have talked over the case in private, in the advice which

he has given to your Lordships that this appeal should be dismissed.

Mr. Bethell.—Will your Lordships pardon me upon the question of costs? I would ask permission to call your Lordships' attention to the fact that you have directed a remit in this case; and I believe that it is usual only to give the costs arising subsequently to the remit. Your Lordships could not decide the case without having the opinions of the Judges upon the remit.

Mr. Rolt.—There was, my Lord, the case of Leith *v.* Young, I believe, in the last session, in which there was a remit, and in which the opinions of the Judges were seven to six; and there your Lordships, I believe, dismissed the appeal, with costs, notwithstanding the remit.

Lord Brougham.—We never consider that a narrow division of opinion among the Judges affects the question of costs.

Mr. Bethell.—The point was not raised there; it is raised now. Your Lordships decided that you would have a remit before you proceeded further.

Lord Chancellor.—With respect to the remit, the learned Counsel for the Appellant succeeded so far on the former hearing, as to induce your Lordships to entertain more doubt upon the matter than perhaps your Lordships may now think, upon further examination of the case, it was right to entertain; but the result of that proceeding was for the benefit of the Duke. He was the party who raised the doubt which gave rise to the remit. But that certainly is no reason why, since it has failed, the costs should not be given.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondents, the costs incurred by them in respect of the said

appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That, unless the costs certified as aforesaid shall be paid to the parties entitled to the same, within one calendar month from the date of the certificate thereof, the cause shall be, and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful and necessary.

RICHARDSON, CONNELL, and LOCH—THOMAS DEANS.

[HEARD 28*th February*—JUDGMENT 25*th March*, 1850.]

JAMES DEWAR BURDEN, of Feddal, *Appellant.*

ANNE CLEGHORN MITCHELL BURDEN, and GEORGE S. M. BURDEN, her husband, *Respondents.*

Tailzie.—Terms of entail held to be sufficient to protect the lands against the contraction of real burdens upon them.

Ibid.—Terms of irritant and resolutive clause held not to be enumerative of acts prohibited and to be general enough to comprehend all of them.

THE Appellant had been the husband of Anne Graham Burden, who was heiress in tail in possession of the lands of Feddal. During the subsistence of the marriage, various accounts of law expenses had been incurred to Cullen, W.S., upon the joint employment of the Appellant and his wife, in regard to obligations which had been granted by her with reference to her estate of Feddal. After her death, the Respondent, Mrs. Burden, her daughter, took up the succession, and entered to possession of the estate of Feddal, as heir under the entail. Thereafter Cullen brought an action for payment of the law expenses which had been incurred to him. This action was directed against the Appellant, as having concurred in the employment, and against the Respondent, as representing her mother, and liable for her debts.

The Appellant then brought an action against the Respondent and her husband, for relief of his liability under Cullen's action, upon the ground that the debt to that gentleman was the proper debt of the Appellant's wife, for which the Respondent was

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liable, inasmuch as she had succeeded to her mother as heir of the lands of Feddal, and as the entail under which her mother possessed these lands did not contain any sufficient fetter against the contraction of debt, they were liable for the mother's debts.

The fetters of the entail under which this question was raised were thus expressed. The entail contained a proviso that the heirs succeeding under it should assume and bear the name and arms of Burns of Feddal, which was fenced with an irritant and resolutive clause, appropriate to it exclusively. It then proceeded thus:—"And sicklike it is hereby specially provided "and declared, and be it so provided and declared by the infeft- "ments to follow hereupon, that it shall not be leisom to, nor "in the power of any of my said daughters, or the heirs of their "bodies succeeding to me in my said lands and estate, to violate "or alter the order and course of succession appointed by this "present tailzie and disposition, nor to sell, annalzie, wadsett, "dispone, or impignorate the said lands and teinds, or to con- "tract debts yrupon, or do any other deed for disposing upon, "or affecting the said lands and estate, except in so far as they "are empowered in manner after mentioned, so that it is "expressly provided and declared that if any of my said "daughters and their heirs succeeding to me, shall contraveen "or fail in performance of any of the provisions and conditions "@ written, or alter the order of succession above sett down, "or dispose upon, and affect the said lands and teinds, whereby "they may be evicted or adjudged from them, all such facts, "deeds, and debts are not only declared to be null, and of no "avail, force, strength, or effect, so far as concerns my said "lands and teinds, which shall no ways be affected or burdened "therewith in prejudice of the other heirs appointed to succeed "thereto, but also the person or persons so contraveening, shall "for themselves only amit and lose their right and interest in "my said lands and estate, in the same manner as if the con- "traveener were naturally dead, and the same shall *ipso facto*

" fall and pertain to the next heir entitled to succeed, albeit " descended of the contraveener's body, and that by way of " service and retour, declarator, or other habile method agree- " able to law as accords: As also, it is hereby provided and " declared that the said Anna Burden my daughter, and her " heirs, which failing, the said Elizabeth and her heirs suc- " ceeding in virtue hereof, shall have power and faculty to " contract and take on as much debts, and to grant bonds, " heritable and moveable, therefore, as will satisfy and pay the " haill debts I shall be resting at the time of my death, with " the burden whereof these presents are granted and to be " accepted of, and no otherwise."

The Respondent pleaded in defence, that she did not represent her mother, and that even if the entail were defective, her mother had not exercised any power which it might be supposed to give her, for disposal of it in payment of her debts.

Cases and additional cases for the parties were laid before the Judges of the other division of the Court and the Lords Ordinary, for their opinion; and thereafter, in conformity with the opinion of a majority of the consulted Judges, the Court pronounced the following interlocutor, the subject of appeal:— " The Lords having again considered the mutual revised cases, " and the opinions of the consulted Judges, find, in conformity " with the opinions of the majority of the whole Judges, that " the deed of entail of the estate of Easter Feddal and others, " executed by James Burden in 1739, contains effectual pro- " hibitions against selling and the contracting of debt, duly " fenced with irritant and resolutive clauses in terms of the " Act 1685, c. 22; and that the Defender, Mrs. Mitchell " Burden, by taking up the estate under said deed of entail, has " not incurred any representation to, or liability for the debts of " her father: Find *separatim* that, as the said deed of entail " contains an effectual prohibition against the contracting of " debt, duly fenced with irritant and resolutive clauses in terms

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" of said Act, even a defect in the irritant clause in regard to " sales would not be relevant to subject the Defender, the heir of " entail in possession of said estates, as representing her mother, " in liability for her debts: Therefore assoilzie the Defenders " from the whole conclusions of the libel, but find no expenses " due, and decern."

Mr. Bethell and *Mr. Inglis* for the Appellant.

I. This entail, from the particular terms in which the irritant clause is framed, is confined to debts by real security upon the lands, for the prohibition is against the heirs " contracting debt " thereupon," " or doing any other deed for disponing upon or " affecting" the lands. These words have reference as well to personal as to real debts. If this were doubtful, the doubt is removed by what follows, viz., " except in so far as they are " empowered in manner after mentioned;" and the manner after mentioned is to contract and take on as much debts, " and to grant bonds heritable and moveable therefore," as would pay the entailer's debts. This shows that the difference between real and personal debts was present to the mind of the entailer. But the irritant clause is directed against " dispon- " ing upon or affecting the said lands, whereby they may be " evicted and adjudged;" terms which have reference to the contraction of debt by real security alone; and therefore it does not affect the power to contract personal debts without " disponing upon or affecting the lands."

II. The irritant clause is not directed against sales of the lands, for although it sets out with general words, which if it had stopped with them would have been sufficient to have embraced the whole prohibitions, that against selling among the rest, it goes on to enumerate what it is directed against, thus:—" or alter the order of succession, or dispone upon and " affect the said lands and teinds," omitting all mention of sale, and therefore, by this enumeration of what the general words

were intended to include, shows that sale was not one of these things. It may be said that as the words which precede "or" in the above quotation are sufficient to include all the specific prohibitions, those words which follow it must be viewed as surplusage; but that would be against the received canon of interpretation, that no words are to be rejected as useless if you can find a meaning for them. Now, a meaning may be given to "or," for to express it more at large, it is just "or in other words," as introductory of the explanation which is to follow of the previous general words. If the enumeration which follows "or" had specified *every* previous prohibition, that clearly would have been surplusage, but the omission of one deprives it of that character, and makes it useful as an explanation. In the Tillycoultry case, *Mor.* 15539, it was laid down that if an entailer use general words, and then betake himself to particular words, the deed will not have the benefit of the general expressions; and in Rennie *v.* Rennie, 3 *Sh. & M'L.*, 167, an enumeration of particulars following general words, was held to take away the effect of the general expressions, though introduced by the word "particularly." In the present case the entailer has attempted to enumerate what he had specified in the prohibitions; but out of four things so specified, he has referred to the first and last alone. Unless then this be held as an attempt at enumeration, unsuccessful no doubt, the deed is made to speak nonsense, and to say that if four things are done, or the first and the last of them, certain effects shall follow. But to make words useless where they can be useful, is contrary to the received rule of construction of such instruments. If the clause, on the contrary, be held to be enumerative, every word receives effect; and the only objection is, that the enumeration is defective, sales and contraction of personal debt being both omitted. Barclay *v.* Adam, 1 *Sh. App., Ca.* 24; Smith *v.* Duffin, 4 *Co. of Sess., Ca.* 523. If there be no fetter against contracting personal debt, or selling

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for payment of it, the Appellant must prevail, because in that case there would be nothing to prevent adjudication of the lands for payment of the personal debt contracted by the last heir in possession.

III. If the entail be defective, either as to contracting debt or as to sales, it will then be entirely inoperative, for it is only such entails as contain all the fetters mentioned in the statute 1685, or entails framed in the mode allowed by that statute which can receive the benefit of it. Stewart *v.* Fullarton, 4 *Wils. Sh.* 211.

Mr. Wortley and *Mr. Anderson* for the Respondents.

LORD BROUGHAM.—My Lords, This case was heard at great length, and was very ably argued, as indeed all these cases have been, by the learned counsel on either side—and my noble and learned friend, the Lord Chancellor, and myself, who heard the case, entertained very little doubt during the argument, agreeing with the Judges in the Court below. Nevertheless, as there was some difference of opinion among them, especially upon one point, we thought it better to take time to consider.

We have since deliberately considered the case, and I am now to state to your Lordships the result of that deliberation, which is certainly an affirmance of our original impression, and that without considering what it does not appear to me to be necessary to consider, the force and effect of the word "or," which your Lordships may recollect—such of you as were present—was the first point, whether it was to be taken as merely a word of explication connecting what followed with what had gone before, and thereby confining the meaning of what had gone before to what followed, or whether it was to be taken in the common sense of the word, namely, that all acts, by so and so, or so and so, or so and so, were to be taken

as entirely independent the one of the other—the generality continuing unimpaired and unchanged, and the particularity only referring to one or two specified cases of that generality, but leaving the other specified and non-enumerated cases (so to speak) of that generality entirely where they would have stood had there been no specification whatever.

My Lords, I believe a majority of the Judges below were of the former opinion, and against the latter opinion, considering the word "or" to limit the preceding generality to the succeeding specification, and not of the latter opinion, which would have made the succeeding specification immaterial to change, to limit, or impair the force of the preceding generality. Their Lordships took the former rather than the latter view, and considered, as we do, that what follows is sufficient, taking the whole matter together, as one or two of the learned Judges say, *totâ re perspectâ*, to constitute a valid and effectual clause.

Now, my Lords, I have stated this particularly, without reading my noble and learned friend's opinion, which he has entrusted me to deliver to your Lordships, for that indeed is the most important part of it. But I thought it right to break the case myself, by giving my own opinion first, because my noble and learned friend does not so minutely as I have thought it necessary to do, recall to your Lordships' recollection the substance of the interlocutor. He says—"It will not "be necessary for me, in explaining the grounds upon which I "have formed an opinion that the interlocutor appealed from "ought to be affirmed, to enter at any length into the wide "field of discussion which has been occupied in the different "stages of this cause—the points upon which my opinion has "been formed being, in my view, simple, and not attended with "much difficulty.

"The Pursuer insists that the entail does not protect the "estate against diligence by creditors, because; first, the con-

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"tracting of debts upon which the land may be adjudged, "although it may be within the prohibition, is not within the "irritant and resolutive clauses; and secondly, if the prohi- "bitory clauses can be considered as applicable to such debts, "the irritant and resolutive clauses enumerating certain pro- "hibitions, but not noticing such debts, deprive the general "words of the effect which they might otherwise have, upon "the authority of the Tillicoultry and Ballilisk cases.

"That the prohibitory clause applies to the contracting "such debts is, I think, free from doubt. It prohibits con- "tracting debts thereupon, or doing any other deed for disposing "upon or affecting the lands and estate, except in so far as they "are empowered in manner after mentioned, and that power is "to pay certain debts.

"But then it is said, that such prohibited debts are not "specifically within the irritant and resolutive clauses. I think "they are, the terms used being 'or dispose upon or affect the "'said lands whereby they may be evicted or adjudged from "'them, all such acts, facts, deeds and debts are declared to be "'null so far as concerns my said lands, which shall nowise be "'affected or burthened therewith in prejudice of the other "'heirs.' The thing spoken of is, amongst other debts, to "affect the lands, and whereby they may be evicted or adjudged "from them. But then it is said that a debt adjudged is "equivalent to a sale, and that sales not being within these "clauses an adjudgment by a creditor is not. This proposition "would be very difficult to be maintained. But it is not "necessary to consider it; for although ordinary sales may not "be included, if an adjudging by a creditor be in any sense a "sale, that particular mode of sale is clearly within all the "clauses, which is all that is requisite.

"The opinion which I have so formed and expressed is "quite sufficient to lead me to the affirming of the interlocutors "appealed from; and I should not say one word upon the

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"Tillicoultry case, were it not that the Lord Justice Clerk "appears to me to have put an erroneous construction upon "what is represented as having been said by me in addressing "the House upon that case, and as explained in Rennie *v.* "Horne. The passage quoted is, that where a party under- "takes to enumerate in the irritant and resolutive clauses those "acts which are to infer forfeiture, the prohibition is inopera- "tive as regards any act which is not enumerated, which can "only mean this, that where the entailer in laying down a law for "his heirs, enumerates certain acts which are to infer forfeiture, "no forfeiture shall attach to an act not enumerated. This "appears to me to be a very plain and unanswerable proposition, "and it leaves the question open upon the construction of "every entail, whether the entailer has undertaken so to enu- "merate those acts which are to infer forfeiture. In the "Tillicoultry case, and Rennie *v.* Horne, I thought such an "intention and undertaking was sufficiently manifest. In the "present case I am clearly of opinion that no such intention or "undertaking can be inferred from the term used. If the "entailer had intended or undertaken to enumerate all the acts "to which the forfeiture should attach, could he possibly have "commenced the sentence by imposing it upon 'contravening, or "'failing in performance of any of the provisions and conditions "'above written, or' then enumerating two of them? A failure "and contravening is intended and expressed without any "reference to the mode in which it may take place, and no "particular act or mode is expressed which might lead to such "failure or contravening. I move your Lordships, therefore, "that the interlocutors appealed from be affirmed.

Now, my Lords, I have already said enough to show that I take entirely the same view with my noble and learned friend, and I have already, in the introductory observations which I made before reading his opinion, given the grounds upon which I join with the Court below, specifying and discri-

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minating as they have between the two grounds which have been taken in this case. Your Lordships will observe, that differing from the Pursuer upon the first point, namely, the effect of the enumeration and specification, the learned Judges in the Court below were with the Pursuer upon the second point saying, "Throw that first point entirely out of view, and "there is still enough here by the force of these terms to satisfy "our minds." And it is upon that ground alone that my noble and learned friend, not here present, and myself, have come to the resolution of affirming this decree, and we wish to affirm it upon the same ground as that upon which it was pronounced below, which was upon the second point, and not the first. I agree therefore with my noble and learned friend, always adopting the wise and the convenient course of not adjudging unnecessarily, but only of adjudicating as much as is necessary to support the judgment in saying nothing whatever upon that question which was raised in the abstract, but as to which adjudication is quite unnecessary. My Lords, upon these grounds, and without going further into the case, I move your Lordships that this interlocutor appealed from be affirmed.

Mr. Bethell.—Will your Lordships pardon me for a moment before the question is put, for observing, that in the Court below this case was deemed a matter of so much nicety and difficulty, that they abstained from finding any expenses. It was the decision of six Judges to seven; and they expressed a desire that it should be determined by this House.

Lord Brougham.—I am quite aware of it. It is quite fit that you should mention it. My Lords, I quite agree with the learned Counsel at the Bar, that there is much to be said upon the point of expenses. I really think that we should do wrong if we were to take an opposite course from the Court below; and therefore, I shall not ask your Lordships in this case to give costs; but I say this without at all intending (and this should

be most carefully guarded against, for it depends here upon the peculiar circumstances of this one individual case of Dewar *v.* Cleghorn), that it should be supposed that wherever there is any division in the Court below, there are to be no costs given here. That is never to be considered at all. It is not upon that ground alone that we do not give costs, but it is *totâ re perspectâ*, as the learned Judges say, under all the peculiar circumstances of a very peculiar case.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed.

THOMAS DEANS—DUNLOP and HOPE.

[HEARD 13*th*—JUDGMENT 14*th July*, 1848.]*

The Most Noble the MARQUIS OF BREADALBANE, *Appellant.*

JAMES MCGREGOR, and others, *Respondents.*

Prescription—Servitude—Drove-Road.—A right for the public generally to have stated resting stances on a drove-road, for cattle using the road, and to pasture the cattle, while resting, on the lands adjoining the stances, is one unknown in law.

Appeal.—An interlocutor remitting for trial by jury a cause not appropriated by the Jury Acts for decision by that mode, may be appealed without leave of the Court below.

Ibid.—An objection to the competence of an appeal ought to be taken immediately on its being presented.

THE Appellant presented a note of suspension and interdict against the Respondents, praying to have them, and all persons employed by them, interdicted from using his lands and farm of Inverouran, or any part of them, for the purpose of resting or feeding cattle or sheep, or for any other purpose, and from trespassing in any way upon the land.

The Respondents were either tenants or proprietors of land, situated, some in distant parts of the kingdom, others more or less near, but none of them contiguous to, the lands of the Appellant, or they were merely dealers in cattle residing promiscuously throughout England and Scotland. In answer to the Appellant's application, the Respondents averred that for centuries the proprietors and tenants of land in the North of Scotland, and those who dealt with them had been in the practice of driving their sheep and cattle to and from the

* This case was, by mistake, omitted at its proper date.

fairs and markets of England and Scotland, along a drove-road which ran through the lands of the Appellant. That in 1745 a Parliamentary road had been formed upon this drove-road, and in 1803 it had been placed under the management of Parliamentary Commissioners. That on their journey certain places, called drove-stances or stages, for resting and refreshing sheep were indispensable, and had existed on the road in qnestion for centuries past, and there were rates of charge for every hundred sheep and every score of cattle, attached to each stance, which had been fixed from time immemorial. That these drove-stances had been immemorially used "by the pro-"prietors, tenantry, and dealers from or connected with the "districts of Appin, Morven," and a variety of other districts stated by name, "the Islands of Skye, Harris," &c., "and "generally the south-western portions of the counties of "Sutherland, Ross, and Inverness, and especially by the "Respondents, and their predecessors, either as proprietors or "tenants of lands situated in said districts, and also by "the public generally," and in particular the drove-stance at Inverouran had been so enjoyed. That the Appellant proposed to remove this stance to Clifton, 7 miles to the south of Inverouran, or 17 miles to the south of Kingshouse, the first stance to the north of Inverouran, a distance which was beyond the physical capacity of the animals to travel, consistently with safe and judicious driving.

The Appellant pleaded in support of his suspension that "the averments of the Respondents were not relevant to "support the claim made by them to the use of his property, "against his will or without his consent for resting or feeding "their cattle or sheep; more especially, in respect the Respon-"dents had not averred the existence of any title to any servi-"tude or pasturage or other servitude over his property, or "even specified any tenements which could in law be held "as dominant tenements, or a dominant tenement, to which

" such right was said to be attached;—in respect the Respon-
" dents had not averred the existence at any time, of any
" drove-roads as distinguished from a public road or highway;—
" in respect the Respondents had not made any averments as to
" possession, which could in law be held as possession, to the
" effect of establishing any right of servitude, or other right
" in or over his property;—and in respect there was no prin-
" ciple or authority in the law to the effect that a proprietor of
" lands adjacent to a drove-road, and *multo majus* a proprietor
" of lands adjacent to a turnpike road, or a military road, or a
" public road or highway, was under any obligation to provide
" accommodation for men or horses, or cattle or sheep, or other
" animals, passing along such road.

" That the proceedings complained of ought to be suspended,
" and the interdict granted, in respect of his right of property
" in the lands and farms referred to, and in respect no use had
" ever been had of, or in regard to, that property, by the
" Respondents or others, but what was reconcileable with, as it
" proceeded from, his exclusive right of property, and that of
" his predecessors, and the exclusive though temporary right
" of his or their tenants to the use of that property.

" That even if the Respondents had the right of servitude,
" or other right claimed by them, the Appellant, in virtue of
" his right of property, was entitled to change the state and
" arrangements of his property in the way he did in 1842, and
" previously in 1835."

The Respondents answered that they, " their authors and pre-
" decessors, and the public at large, having for time immemorial,
" at least for forty years, had the use and occupation of the
" drove-stance in question, on payment of the fixed and accus-
" tomed rate; and this use and occupation being indispensable
" for the use as a drove-road of the road in question, the
" Respondents were entitled to the continuance of the same use

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" and occupation, on the same terms, conform to immemorial " use and wont."

The cause having been remitted to the issue clerks to prepare an issue between the parties, an objection was taken by the Appellant that the averments of the Respondents were not relevant to support an issue. This objection was disposed of by the Court by an interlocutor finding that there " are relevant " averments fit to be the subject of a jury trial."

The appeal was taken against this interlocutor.

The Lord Advocate and *Mr. Bethell* for the Appellant.

I. The Appellant does not deny the right of the Respondents, and of the public at large, to use the road in question *qua* road; but that right does not give them any title to use his lands for feeding the sheep and cattle they may drive along the road, without his consent. It may be true, as averred by the Respondents, that they and their predecessors, and the public at large, have had the use and occupation of the drove-stance on payment of a fixed rate; but that does not infer any right in them, or in the public, to compel the Appellant or his tenants to continue the sale of this use and occupation upon the same terms, or upon any terms whatever. The Appellant is under no restraint to discontinue the arrangement so soon as it suits his convenience or inclination so to do. The Respondents may cease taking their cattle to the stance whensoever they choose; and, on the other hand, the Appellant is equally at liberty o prevent them continuing to do so.

But the Respondents say it is indispensable to the use of the road, as a drove-road, that there should be a drove-stance, else the road could not be used. That may be true; but still it does not necessarily follow that the Appellant is compellable to give this accommodation in the particular locality in which they have chosen to demand it, or even to give it at all. The necessity for

the accommodation, though admitted, leaves the matter just where it was—the subject of negotiation between the parties—as all accommodation for men or cattle upon every public road is, although equally indispensable to its use with that which is claimed in the present instance.

II. If the Respondents meant to rest their claim to the stance and pasturage, upon the ground of its being a servitude to which they had acquired right, it would have been necessary for them, before being allowed to prove this right, to aver the possession or ownership of some lands in respect of which the servitude had been acquired; for in the law of Scotland there are no such rights as personal servitudes, but *prædium servit prædio.* There must, therefore, be a dominant as well as a servient tenement—one to which the servitude is due, as well as one by which it is due (*Ersk.* ii. 9, 5). But there is no averment upon the record either of possession of, or property in, any land in respect of which the right in question is claimed. This averment is the more especially necessary because the particular servitude claimed—that of pasturage—is regulated as to its extent by the extent of the land in right of which it is asserted (*Ersk.* ii. 9, 14); and the benefit of it cannot be communicated by the owner of the dominant tenement to the cattle or sheep of other persons. Earl of Breadalbane, *Elchie's Rep. voce Servitude;* Murray *v.* Magistrates of Peebles, 8th December, 1808, *F.C.* Nay, more, the dominant tenement, if not immediately contiguous to the servient, must at all events be in the neighbourhood of it (*Ersk.* ii. 9, 33; *Heinec ad Pande,* ii. 160); whereas in the present instance the right is claimed, not for any particular lands, but for whole districts or tracts of country lying at the distance of 60, 80, and even 100 miles from the servient tenement.

III. If this right of pasturage be claimed as a privilege common to the whole public, such a claim can only be supported by averments that the lands over which it is claimed or the right

itself is *inter regalia*, and held by the Crown for the benefit of the community; but the Respondents have not ventured to make any such averment, for a good reason, because it would be inconsistent with the fact, and is directly negatived by the admitted payment by every one who has hitherto had the benefit of the pasturage.

IV. The right cannot be claimed as an accessory to the public drove-road, which the Appellant admits does run through his lands, and the use of which he does not dispute, for the use of such a road is for *passage* only. No doubt, as *Stair* ii. 1. 7 says, the pasturage of the way follows the way itself, and that also the Appellant does not dispute. But there is no authority for saying that a right to the use of the way gives a right to the use of the pasturage, not of the land forming part of the way, but running along the side of it. No doubt in Campbell *v.* Campbell, 5 *Bro. Supp.* 599 it is said that such a right was there claimed, but the Report does not show that the claim was allowed; on the contrary, the reservation from the interdict *uti possidetis* as to ground under crop or enclosed would lead to the inference that the decision was confined to the roads alone.

Sir F. Kelly, *Mr. Rolt*, and *Mr. Anderson* for the Respondents.—The only question which can be decided upon this appeal is the relevancy of the Respondents' averments to justify sending them for trial by an issue. The import of the interlocutor complained of is, that there is nothing so repugnant or unjust in the right claimed as to preclude a trial of the facts in order to ascertain the nature of the right and the circumstances under which it is claimed.

The averments are, that places for resting and refreshing sheep and cattle are invariable and indispensable accompaniments of a drove-road; that the stance in question has been immemorially attached to the drove-road passing through Inverouran, and has been immemorially used by the proprietors and

tenants of certain districts, and especially by the Respondents, every one of whom is either a tenant or a proprietor of land in one of the districts. The only question, then, can be, whether this is such a right as the law recognizes and as may exist; because if it be, there is sufficient averment to try the question.

[*Lord Campbell.*—How do you define the right?]

A right to a public drove-road with right of places for feeding and resting for all cattle travelling along the road, they paying a fixed sum at certain places, of which Inverouran is one. Unless there be such a right, there cannot be any exit for the cattle from the districts in respect of which it is claimed. It is said that this right, if it exist at all, must be a servitude, and then it is asked, where is the dominant tenement? But *Stair* ii. 7. 10 says, "Ways are part of the reservation from property, and the "necessary vestige of the ancient community of the earth; "free ish and entry is implied in the very right of property. It "is the necessary effect of property rather than a servitude."

If this right of passage is to be called a servitude, it certainly is not in any case in respect of any dominant tenement. Nevertheless, in the present instance, complaint is made that the right claimed is ill-defined, because it is made in behalf of a district embracing all the north-west of Scotland; but Hamilton v. Aikman, 5 *Jur.* 7. and Home *v.* Young, 9 *Co. of Sess., Ca.* 286, and *Hailes*, Dec. 280, were instances of easements sustained in favour of the inhabitants generally of a town and burgh, and Porteous *v.* Allan, *Mor.* 14,512, and Campbell *v.* Campbell, 5 *Bro. Supp.* 599, are examples of a claim similar to the present made, in these instances, as in this, on behalf of the inhabitants of extensive districts of country. The cases therefore, and institutional writers, show that it is not necessary for the Respondents to found their claim upon the possession of a dominant tenement.

Porteous *v.* Allan, and Campbell *v.* Campbell, further establish that a right of road for the passage of cattle by a way

not used for the passage of carts or carriages, is recognized in the law of Scotland, in mountainous districts, and that this right may be acquired by the inhabitants of the remoter districts, to whom it is absolutely necessary as a means of communication with the low-lying countries. If it be conceded that there is this right of drove-road, then pasturage along the road, and stances for the resting of the cattle must be an accessory to the right of passage, for without the one the enjoyment of the other would plainly be impossible; and if that be conceded, all that can remain is proof of the possession and mode of enjoyment by those on behalf of whom the right is claimed, that is to say, of the positions or locality of the resting stances. The Respondents made substantive averments upon this subject in the Court below, and were prepared to support them by evidence. If they had been allowed to do so, the evidence would have shown, not only the existence of the right, but its indispensability—the absolute necessity that there is for it. No doubt the averments did include a statement that a fixed sum had been in use to be paid for the stances and pasturage; and there may be an anomaly in this. It may not exist in the case of any other easement or servitude; but it does not follow that this must negative the right itself, if indeed it should not rather support it. If a right of passage for cattle and sheep where there is no passage for carts or carriages be admitted, from the mere necessity of the case, as one of "the vestiges of the ancient "community of the earth;" the very same necessity will support the claim for resting and pasturage, not over every part of the road, for that would be both impracticable as well as unnecessary, but at certain fixed points; and if the enjoyment at these points be established from time immemorial, as was averred here, the law will not inquire how this originated, or the particular mode or terms upon which the right was conceded, any more than it will make such an inquiry as to the right of way. And if the averment extend to showing that a

consideration has been paid for the benefit enjoyed, this is only so much deducted from the hardship which the necessity of the case imposed upon the party by whom the enjoyment is conceded. He has payment made to him for the forced use of his pasturage, instead of having to give it for nothing, as in the case of the use of his ground for the passage of the cattle; but the fact of the payment no way detracts from the necessity which is the foundation of the right of way, as it is of the right of pasturage. In Roxburgh *v.* Dunbar, *Forbes' Cases*, 675, the inhabitants of the town of Dunbar were found entitled to carry their fish over the lands of the Duke of Roxburgh, when prevented reaching their own harbour by the state of the weather, upon paying so much for every loaded horse or cart. That case shows that a servitude for which a consideration is paid, is not unknown in the law of Scotland.

Apart from the merits, this appeal is incompetent, inasmuch as it has not been brought with the leave of the Court below. By the 4th sect. of 59 Geo. III. a power is given to the Court to remit for trial by jury such cases, not coming within the enumeration in the 1st sect. of cases appropriated by the statute itself for trial by jury, as in the opinion of the Court are proper to be tried by that mode, and by the 15th sect. of the statute no appeal is given against the decision of the Court upon the question of remit or no remit, unless with the special leave of the Court first asked and obtained: and this provision was substantially re-enacted by the 33d sect. of 6 Geo. IV. cap. 120. Before, therefore, any appeal could have been taken in the present case it would have been necessary for the Appellant to have had the leave of the Court, and not having either asked or obtained it, the appeal cannot be entertained.

The Lord Advocate in reply, was directed by the Lord Chancellor to confine his observations to the point of competency.

The Lord Advocate, in reply.—It is too late now to object to the competency, that should have been done before the appeal

Committee, while as yet the cases were not prepared, or any other expense incurred; now the whole mischief has already occurred which the statute intended to prevent. But in truth there is nothing in the objection, for the terms of the 33d sect. of 6 Geo. IV. show that it has reference only to the cases which had been enumerated, as those which must be sent for trial by jury, without leaving any discretion to be exercised by the Court upon the subject. The present not being one of the enumerated cases, rests on the older statutes.

LORD CHANCELLOR.—My Lords, in this case there was a preliminary objection raised. It was a matter of discussion how far the appeal from this interlocutor was competent, on the ground of the case being one of those with respect to which the Act provides that it shall not be the subject of appeal on interlocutory matter. My Lords, I have looked into the Acts; and it appears to me, that the section of the Act of Parliament which is relied upon does not apply to this case. That section refers either to cases which are enumerated in the Act of Parliament, as those which must, of necessity, go to the Jury Court, or to those cases in which the Lord Ordinary sees reason to send them there in the first instance; and it does not refer to those cases where the Court of Session, having jurisdiction over the matter, finds it necessary, for the purpose of disposing of the case, to direct an issue to be tried. The Judges were divided in the Court below, as regards the appeal being prohibited by the section in question, but now I apprehend the appeal is competent; and, therefore, we have now to look to the merits disclosed in the proceedings before the Court of Session. I must observe, however, that, if this had been a case of incompetency, the parties have not followed the right course. They ought to have brought that objection before the consideration of the House at an earlier stage of the appeal, for the purpose of the case being dismissed as incompetent. It would then have

been referred to the Appeal Committee, and would have been disposed of before the expense of attending at the Bar of the House had been incurred. But, my Lords, it is quite sufficient for the present purpose to say, that there is no ground for the objection on the score of competency.

The question then is, whether the interlocutor of the Court of Session appealed from, can be supported? Now, the interlocutor finds that there are relevant averments fit to be submitted to a jury trial, which I construe to mean, not that it is a matter depending upon a fact to be tried, but that there are averments which, in point of fact, if found one way, in favour of the right claimed, would not only enable the Court, but make it the duty of the Court, under this declarator, to find that the custom was good on behalf of those who claimed the benefit of it. We have, therefore, to see what the custom is, as it is alleged by the Respondents. Now, the Respondents state that, "for centuries, the proprietors and tenantry northward of the "Grampians, and those dealing with them, have been in the "practice of driving sheep and cattle, to and from the southern "fairs and markets of Scotland and England, along two lines of "drove-road." It then describes the roads by which these cattle were said to be driven; and it then says—"This drove-"road"—which is one of those described—"by Glencoe and "the Blackmount, was used for driving sheep." Then, in the second statement, it says—"On their journey, certain places "for resting and refreshing sheep and cattle are indispensable. "These places are generally situated at the average distance of "ten miles from one another—being the safe and proper distance "sheep and cattle on a journey can daily travel without sus-"taining serious injury—and they are called drove-stances or "stages, and are invariable and indispensable accompaniments "of drove-roads; and on the great drove-road by Glencoe and "the Blackmount, above described, there have been, for cen-"turies past, and as far back as its history reaches, drove-stances

" at stated distances for the resting of the sheep and cattle; " there are fixed rates of charge for every hundred sheep, and " every score of cattle attached to such stance, and these rates— " generally 1*s.* 6*d.* for every hundred sheep, and the like for " every score of cattle, for each night—have been fixed for " time immemorial." Then it states—" These several drove- " stances have been immemorially used and enjoyed by the " proprietors, tenantry, and dealers, from or connected with" certain districts which are enumerated, " and, generally, the " south-western portions of the counties of Sutherland, Ross, " and Inverness, and especially by the Respondents and their " predecessors, either as proprietors or tenants of lands situated " in said districts—every one of the Respondents being either a " proprietor of lands, or a tenant of lands, in one or other of " said districts—and also by the public generally: In parti- " cular, the drove-stance at Inverouran has been so used and " enjoyed." Then we find, in the plea in law for the Respondents, it is thus stated—" The Respondents, their authors, " and predecessors, and the public at large, having, for " time immemorial, at least for forty years, had the use and " occupation of the drove-stance hereinbefore described, on " payment of the fixed and accustomed rate, and the said use " and occupation being indispensable for the use, as a drove- " road, of the road mentioned in article first hereof, the Res- " pondents are entitled to the continuance of same use and " occupation on the same terms, conform to immemorial use " and wont." Now, although the statement enumerates certain districts, they are, in fact, a large portion of the northern part of Scotland; but that is very immaterial, because it is accompanied with a claim for the public generally. It is not in respect of any tenancy or servitude, or any connection between those who occupy and enjoy the land from which the sheep and cattle came, and the individual who occupies the land over which this pasture is claimed; but it is for the public generally.

In the first place, the use of the drove-road is not in dispute; but this right is claimed as necessary and incident to the enjoyment of the drove-road. The claim is, to have the benefit and right of the pasturage for sheep and cattle over certain pastures, the extent of which is not ascertained in the proceedings, but in certain districts totally unconnected in any other way with the drove-roads, except as, according to the statement of the Respondents, for the purpose of pasturing their cattle. It is, therefore, a right of pasturage claimed as an incident to a drove-road. My Lords, I cannot possibly understand the statement made, or the claim insisted upon, by the party otherwise than in that sense—for I only use the very words on which they claim it themselves. The question is simply, whether such a claim can be maintained in point of law? We have in vain listened in order to see what authority there is for that proposition. If there had been authority for it in the law of Scotland, we must have endeavoured to discover the principle on which the decisions had taken place. But it so happens that there is no authority—there were only two cases in which the claim ever was raised, and in these it was not decided. It has been a claim which parties have been anxious to establish; but there has been no decision in its favour.

Then, if there is no decision in its favour, is it possible to support it upon principle? It is a claim of a right of pasturage over certain portions of land—the extent of which is not ascertained—belonging to another individual, in respect of what? Why, in respect of the right to drive cattle through the land—that is, of a right of passage. As incident to that, and as necessary and indispensable to its enjoyment, a right is claimed of pasturage at large over certain unascertained districts, extended beyond the limits necessary for the passage of the cattle. I can find no authority for that—none has been referred to, to justify the House in coming to the conclusion, that the right so claimed has been established by decision. Therefore, in the absence of

any decision, it was treated by the Court below as a perfectly new case. My Lords, in the absence of such decision, I cannot advise your Lordships to establish, as a principle, that there is such a right as that claimed. If you agree with this view of the case, I should advise your Lordships to negative the finding of the Court of Session that the averments are relevant for the purpose of the issue; to discharge the interlocutor; and to remit the case back to the Court of Session, to take such course as to that Court shall seem fit.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend on both points. First, as to the competency of the appeal upon the provisions of the Appeal Act, 6 George IV., and also upon the merits of the case. Upon the Appeal Act, there can be no doubt whatever, in my opinion. I have referred, with my noble and learned friend near me, to the two cases which have been referred to; and we thought that the one did not help the case, and the other, we thought, did not injure or affect the case of the Respondents; so that those two cases have nothing to do with the question. If there were decided cases supporting such a claim—however difficult, as lawyers, we might find it to be to uphold such a claim as this, resting on no intelligible principle whatever—we should have been bound to adhere to the decisions that led to that conclusion. None such, however, has been cited. The question appears to have been ventilated repeatedly—at least in those two cases—but never decided.

There is no authority for such a claim on principle; and it is one of the most absurd of which I ever heard. It is anything for anybody. There is no district pointed out, in which the party claiming must be owner or resident, but any person coming there for any purpose in the north may claim this right. It takes a wide range, and might include all the Highlands. Then, if it is good for anything, it is good for *redeundo*

as well as *eundo*. The same cattle are not very likely to be taken back; but, supposing others are taken to improve the breeds in the north, I do not see why the same claim should not be set up for such cattle and others to the south and south-east.

It is a claim founded on a right of way. It is a claim made because there is a way—a "drove-road," as it is called—and which has not been disputed. It has been stated as if that were put in issue—which it has not been. I do not apprehend that it has been disputed. The Appellant here (the Defendant below) is not interested in disputing the right of driving cattle there. It is not very clearly stated in respect of what tha right exists; but still he has no interest to dispute it. But to say, because I have a right to drive cattle over a certain common, or over a certain district of country, that I have therefore a right to depasture those cattle, is as perfectly a new proposition, in point of law, as I ever heard contended for. When you have a drift-road here—a right to drive cattle over grass-lands—there is no doubt that the cattle may take a few blades of grass without committing a trespass. No doubt, it is hardly possible but that they must pick a little now and then: it is almost necessarily incident to driving cattle over a pasture. But this is a claim of right to stop for a night at a time on what is called a stance—which is a wide bit of land adjoining the road; it is not the roadside, but the adjoining land. Even upon the road, that would be doubtful. But that is not the question. One of the learned Judges says this is a sort of elongation or extension of the right of way. I think it is a very curious extension of the right of way that you should have a right of eating and feeding. It may be a very good, necessary, and laudable thing to be done on a journey; but it is no part of the travelling on the road that I should eat; and, therefore, it is very fit that I should pay for what I eat, and also for what

the cattle eat. I cannot at all see that this is necessary to the right of way—in such a manner at least. To make anything good of their argument, it must be made out that it is so incident to the right of way—that it is a necessary parcel to the right of way. Nothing of that kind has been done. I am, therefore, clearly of opinion, that this right does not exist; and that it cannot be supported.

LORD CAMPBELL.—My Lords, I do not feel it necessary to add anything to the observations which have been already made to your Lordships, on the two points which have been discussed by my noble and learned friends who have preceded me. On the subject of competency, I do not doubt that the appeal is competent. On the merits I have a clear and strong opinion. I am very anxious that it should be understood that we say nothing at all respecting the drove-road. This appeal by Lord Breadalbane has nothing to do with the drove-road—that is not in dispute, and, probably, he cannot dispute it. The appeal relates to the stances only. What are the stances? The stances are fields or portions of the mountain adjoining the drove-way, over which it is contended that cattle have a right to pasture on their way from the north to the south; and it is very material that your Lordships should bear in mind what the claim is that is now set up. It is not at all a right of passage; but it is a right of pasture. It is a right to take the profits of the soil without the consent of the owner of the soil—certainly on payment of certain fixed remuneration—which is supposed not to arise from contract, but to be matter of right.

The public may very well have a right of passage, but a right to take the soil, or the profits of the soil, without the consent of the owner, is a thing wholly unknown to the law of England, and, I think, wholly unknown to the law of Scotland. There may very well be a drove-road established by usage, and that

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drove-road may be open to all the Queen's subjects; but a drove-road is only a right of passage for cattle along the road—it gives that right, and nothing more.

But what is claimed here is a right to stop upon the adjoining territory, and that the cattle should be depastured upon that territory; and it is a claim, my Lords, not confined to any particular district; for, looking at the language of the claim, it amounts to a claim for all the Queen's subjects coming from the north to the south—it must, of necessity, belong to them also in going from the south to the north.

This claim, it is allowed on all hands, is novel in the Courts of Justice in Scotland; because—unless as limited in the case of the Campbells, which seems to have caused infinite astonishment—we find no authority for it either in the Scottish text-writers, or in the decisions of the Courts of Justice. The Judges, on all hands, allow that it is novel.

Then, if this is novel—if there is no authority for it in the text-writers, or in decided cases—it must be shown that it rests on principle. Upon what principle does it rest? It is said that it is necessary. What! can there be no drove-road without a right of stance? Is there any such thing in England? In England we have drove-roads, which we call drift-roads; but the right of stance was never dreamt of. Why is it necessary for a drove-road more than any other road? Suppose that there had been a road established through these glens, which the Queen's subjects had a right to use for carriages as well as for driving their cattle, and that carriages were driven along it—would this claim apply to such a road as that? If so, you must say that, wherever there is a public road over which cattle may be driven, either in common with carriages, or without carriages, that every ten miles there must of necessity be a right of pasture.

Certainly, that is a thing that was never heard of, or dreamt of, before. But then the very ingenious Judge to whom my

noble and learned friend has referred (Lord Jeffrey) draws an analogy, and says, this is no more than an expansion of the drove-road; because he likens it most ingeniously to a river swelling every now and then into a lake; and he says a lake is only an expansion of the river, and the stance is only an expansion of the drove-road. Surely, if this stance and drove-way were a case of the same nature as a river which, after being contracted between mountains, and dashing along over rocks, expands into a lake, that might be so. But, with great deference to that most learned and able Judge—whom I infinitely respect as well as esteem—there is no resemblance between a drove-road and a river; because the drove-road is simply the right of passage, and between stance and stance there is no right of pasture.

I observe it is stated that the pasture upon the drove-road belongs to those who use the drove-road. Now, that I take leave very much to doubt, or, I might say, to deny. The notion has been suggested, that, wherever a road is established, the soil of the road belongs to the public. That is a fallacy. There may be a road established by usage for forty years; but the soil of the road continues to belong to the co-terminous owner. If there are minerals under the road, the minerals are his; if trees grow upon the road, the trees are his; if there is grass upon the road, he may take the grass—subject always to the public servitude. My noble and learned friend said the cattle may, no doubt, nibble as they pass along the drove-road; but that is not a matter of right—it is a matter of accident; and it might be stated, in pleading, by way of excuse, not as a matter of right. I believe, on this point, the law of Scotland and the law of England are the same. Suppose an action of trespass is brought by the owner of a close for driving cattle along the close, the defendant would say that he had a right of driving his cattle through the drove-road existing in the said close; and supposing the declaration stated the cattle were driven along his close, and

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that they ate the grass as they went along—it would be necessary for the defendant to justify both. He would justify going along the close by the drove-road. Then he would say, when the pleadings were in Latin, that, *raptim et sparsim*, the cattle ate the grass, which was done unavoidably—not that they had a right to pasture on the drove-road, but that, by stealth, and by accident, the cattle did eat a few of the blades of grass. It is merely an excuse for the trespass—it is not a right. Now, such is the nature of the drove-road—there is no right. Therefore, I think that the learned Judge's ingenious analogy fails in supposing that, upon the drove-road, there is the right of depasturing cattle.

But then we come to the stance; the essence of the stance is the right of pasturage, to take the produce of the soil. Now, there may very well be a drove-road. A drove-road is an easement which is exercised by all the Queen's subjects, and is merely a right of passage, and may be exercised by an indefinite number. But when you come to take the produce of the soil, and eat the grass that is growing in those fields, it cannot be claimed by the public—and it would be absurd, because what part of the public is to have this right? Suppose there comes drove after drove, when the land is quite bare is it to be enlarged? Is the owner of the land to be obliged to bring down hay or grass for the purpose of feeding them? The thing becomes absurd when you say that the whole of the Queen's subjects have a right to pasture on any particular spot. For these reasons, it seems to me that this right cannot be supported. Then, we are told that it is inconsistent with the duties of property to deny such an accommodation to the public. My Lords, a court of justice cannot enter into this consideration. It is said here that Lord Breadalbane has offered other stances equally commodious; but into that we cannot inquire. It would have been the same for our decision if he had refused the stance altogether. It would have been

the same to us sitting in our judicial capacity. But, my Lords, wherever there is an abuse of property, the proper method of proceeding is, not for a court of justice to exceed the law, but for the Legislature to interfere; and if it should happen that there should be such an abuse of property as that persons coming from a distant region of the north were not allowed to have stances for resting and feeding their cattle, I for one should not hesitate for a moment about assisting, and affording to them a remedy. Such an abuse of property should be remedied by the Legislature, and not by courts of justice. There is considerable analogy as to what my noble and learned friend near me suggests with regard to stances for places of worship. I think the noble Appellant will not deny that it would be a great abuse of the rights of property if the proprietor of extensive districts were to refuse stances or sites for erecting places of religious worship, where God may be prayed to according to the religious notions of any particular sect; and I am sure that he would most willingly concur in any remedy that may be proposed for such an evil. I should say, likewise, that if there were a denial of sites for the refreshment of cattle, that would be an equally good ground for interference by the Legislature; but that is no ground at all for perverting the law.

For these reasons, I entirely concur in the opinion which has been given by my noble and learned friends.

With respect to the payments, it is quite clear that these were conventional—that they were matters of contract, aud not payments to be made in the enforcement of the right.

But the ground of my judgment is, that this alleged claim cannot be supported in law; and, if there had been a verdict of a jury finding that there was such a custom, I should say the custom was void, and ought not to be carried into effect.

Lord Brougham.—I cannot agree with my noble and learned friend's view on the subject of legislation. I do not pledge myself upon legislation as he has done, and as, I daresay, the

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noble Appellant would do. My noble friend's argument, as regards all persons claiming a right of pasture for their cattle, is very admirable; and it shows that it would be impossible to draw the inference, from a right of way, that there was a right of pasturage. The right of way may be claimed by all the Queen's subjects, because it is the common right; but the right of pasturage is inconsistent with that, for one party may take it away, and then the rest would go without it; therefore they cannot all have it.

Lord Campbell.—The old distinction in the law of England is, that a *profit a prendre* can only be prescribed for in a *que state*—that is, there must be, as in the Scotch law, a dominant estate, and a servitude attached thereto. But with regard to a simple easement, that may be claimed by all. I believe, on a proper discussion, the law of Scotland will be found to be the same.

Sir F. Kelly.—As I understand your Lordships' judgment, it proceeds exclusively on the claim to the stance. Your Lordships will be pleased so to frame the decree as to leave open the question as to the right to the drove-way.

Lord Chancellor.—Yes; we do not interfere with that. We send the case back to the Court of Session, to deal with it as they may think right, according to the declaration negativing the finding of the Court of Session.

Lord Advocate.—That there are no relevant averments to support the claim to the drove-stance.

Lord Brougham.—It is said to be irrelevant with respect to the stance exclusively.

Lord Advocate.—Your Lordships will reserve the costs in the Court below.

Lord Chancellor.—There were no costs given below.

Lord Advocate.—What I ask is, that your Lordships will reserve them; because the Court below might think itself precluded from giving costs by this proceeding.

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Lord Chancellor.—The interlocutor does not touch the question of costs.

Lord Advocate.—That, my Lord, is quite understood here; but, in the Court below, there is a difficulty—whether we can claim costs in the Court below prior to appeal.

Lord Chancellor.—I understand the effect will be, to remit the case back just as it stood before the interlocutor was pronounced, but with a declaration, that the interlocutor was wrong.

Lord Brougham.—The Court below will go on from that point in the case as if the judgment of relevancy and this appeal had not taken place.

GRAHAM, WEEMS and GRAHAM—THOMAS DEANS.

[HEARD *4th*—JUDGMENT *25th March*, 1850.]

ROBERT BOGLE & Co., Merchants in Glasgow, *Appellants.*

SIR THOMAS JOHN INGLIS COCHRANE, K.C.B., and his Commissioners, *Respondents.*

Tailzie.—Where there is an effectual fetter against the contraction of debt, and adjudging for payment of it, the creditor cannot work out his remedy by taking advantage of a defect in the fetters against selling, by adjudging the lands for payment of his debt, on the pretext that adjudication being a judicial sale, it is not prohibited.

ON 15th of June, 1802, General James Inglis Hamilton executed an entail of his lands of Murdostown in favour of James Hamilton and a series of heirs under the following fetters: —"Which disposition and assignation is granted and is to be "accepted by the said Captain James Hamilton and his fore- "saids whom failing the other persons before named and their "descendants heirs of this entail with and under the foresaid "burden and also with and under the provisions declarations "conditions limitations and reservations following and no other- "ways likeas it is hereby provided conditioned and declared "that it shall not be leisom or lawful for the said Captain James "Hamilton nor his foresaids nor for any other of the other "heirs of this entail above-named or their descendants male or "female succeeding to the said lands in virtue hereof to burden "or affect the same with any debt or sums of money over and "above the sum of 8000 merks Scots with which sum they are "hereby allowed to burden and affect the same and which sum "being once made a burden on the said estate by the said Cap- "tain James Hamilton or his foresaids or any other of the

" persons substitutes or their descendants heirs of entail no
" more can be laid upon it And if they do in the contrair all
" such debts and deeds and bonds granted for the sums of money
" more than the 8000 merks are hereby declared to be void
" and null in so far as concerns or may extend against the said
" lands of Murdoston and others above written And if it shall
" happen that the said lands be adjudged for payment thereof
" from the said Captain James Hamilton or any of his foresaids
" or any of the persons before named and their heirs of taillie
" or descendants then and in that case the person against whom
" the said adjudication shall be obtained or his descendants heirs
" of entail shall be bound and obliged to pay the said debt and
" relieve the foresaid lands and estate thereof within seven years
" after the date of the said adjudication wherein if they fail being
" first required thereto by the next heir of entail in presence of
" a notary public and witnesses as effeirs and shall suffer an
" half-year to elapse thereafter without paying the said debt in
" the said adjudication or redeeming the same and freeing and
" disburdening the said five-pound land thereof then and in that
" case the person failing and neglecting so to do shall *ipso facto*
" amit and lose all right they had to the said lands and it shall
" be leisom and lawful for the next heir of entail to succeed
" thereto as if the contravener were actually dead without pre-
" judice however to the said Captain James Hamilton to provide
" for any spouse he may have a jointure or annuity out of the
" said estate or lands hereby disponed not exceeding 133*l.* 6*s.* 8*d.*
" sterling and to his heirs male and the other persons substitutes
" and their heirs male to provide an yearly jointure or annuity
" to their spouses during their lives of a sum not exceeding eight
" hundred merks only And it is hereby further declared and pro-
" vided that the said Captain James Hamilton and his foresaids
" nor the persons above-named and their descendants heirs of
" this entail shall not sell alienate or dispone the said lands or
" any part thereof nor do any fact or deed directly or indirectly

" whereby the right to the said lands or any part thereof may " be evicted from them or the order of succession above set " down in any degree changed or altered Nor shall it be lawful " to or in their power to sell or dispose of the household furni- " ture and other moveables above assigned and disponed to " them with the lands and to make a part of this entail except " the cattle that may be on the ground and such part of the " furniture as cannot be preserved from utter decay and perishing " nor shall it be lawful to them to cut down or sell the fine " growing baron timber upon the estate except what is copse and " fir trees as they decay in order to preserve the beauty of the " place and if they do in the contrary the person so contravening " shall amit and lose all right he had to the said lands and it " shall be leisom and lawful for the next heir of entail to suc- " ceed thereto as if the contravener were truly dead and likewise " it is hereby provided and declared that the said Captain James " Hamilton and his heirs-male and the persons before named " substitutes and their heirs-male and the husbands of the heirs- " female who shall succeed and be married shall bear and use " the name and arms of Inglis of Murdoston and if they or any " of them shall fail to observe this and the several clauses pro- " visions conditions and declarations before-written then and in " that case the person so failing and contravening shall amit " and lose the benefit of this present right and disposition and " the right of the foresaid lands shall fall accresce and belong to " the next heir of entail that would succeed if the said contra- " vener was actually dead."

The succession to the lands opened to Sir Alexander Cochrane, who was infeft in them in July, 1820, under a precept of *clare constat* from the superior.

Previous to having been so infeft, Sir Alexander Cochrane had granted a bond and disposition in security over the lands for the sum of 8000 merks, the sum allowed by the entail to be borrowed by the heirs.

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In the year 1821, Sir Alexander gave the Appellants a bond and mortgage over estates in the West Indies for payment of another sum of 12,000*l.*

The Appellants brought an action against Sir Alexander for payment of the sum owing upon this last bond, and for adjudication of the lands of Murdostown. In June, 1831, the Appellants obtained decree in that action, adjudging the lands, "and all "right, title, and interest, claim of right, property, and pos- "session, petitory or possessory, which the Defender, his "authors or predecessors, heirs or successors, has, or may "claim, or pretend thereto, particularly the power and faculty "competent to the Defender to sell the said lands and others "under the disposition and deed of succession granted by the "said General James Inglis Hamilton in his favour, dated "the 15th day of June 1802, together with all and sundry "charters, dispositions, assignations, conveyances, procura- "tories and instruments of resignation, precepts and instru- "ments of sasine, contracts special and general, services, "adjudications, decrees of sale, tacks and rights of teinds, "decrees of plat, prorogation, and valuation thereof, and all "other writs, evidents, rights, titles, and securities of and "concerning the said lands and others, with all reversion of "the same, legal or conventional, and decerned and declared, "and hereby decern and declare the same to pertain and "belong to the Pursuers, their heirs and assignees heritably, "for payment and satisfaction to them of the foresaid principal "sum of 12,000*l.*, and interest thereof from the said 30th day "of April, 1830, to the date of this decreet of adjudication, all "contained in the bond above narrated, and ordained, and "hereby ordain the Pursuers and their foresaids, to be infeft "and seized in the lands, rights, and others foresaid so "adjudged, to be held by them of the immediate lawful "superiors of the same, in the same manner, and as freely in "all respects as the Defender, his predecessors and authors,

"held, hold, or might have held the same, reserving all objec-
"tions *contra executionem*, and ordains letters of horning," &c.

Upon this decree the Appellants charged the superior of the lands to grant them a charter of adjudication, which he did on 14th January, 1832, and they were infeft upon it on the 24th of the same month.

On the 26th of January, 1832, Sir Alexander Cochrane died, and on the 27th the Appellants recorded their infeftment.

On the 27th February, 1832, the Respondent, the son of Sir Alexander, obtained a precept of *clare constat* from the superior, upon which he was infeft in the lands as next heir of entail after his father, and his infeftment was recorded on the 2nd of March, 1832.

In May, 1832, the Respondent brought an action against the Appellants, concluding for reduction of the decree and charter of adjudication which had been obtained by them, and their infeftment upon the charter, upon the ground that Sir Alexander Cochrane possessed the lands under the entail of 1802, containing fetters against contracting debt, except to a certain amount; that this power had been exercised and exhausted previously to the contraction of the Appellants' debt, and therefore their adjudication was inhabile and inept, and adjudication of Sir Alexander's supposed power to sell the lands was incompetent, and even if the adjudication had been competent when it was pronounced, it had fallen by the death of Sir Alexander before the power had been exercised by an actual sale of the lands.

The Appellants pleaded in defence, that Sir Alexander Cochrane had power under the entail to sell the lands, and that power had been duly attached and was vested in them by the adjudication, and it was *jus tertii* to the Respondent when the power might be exercised.

The Lord Ordinary (*Cuninghame*) upon advising cases for the parties, pronounced the following interlocutor, adding a very long note explanatory of his reasons. "Finds it sufficiently

" established, 1. That the late Sir Alexander Cochrane, the " original debtor, and the predecessor of Sir Thomas Cochrane, " Pursuer of the Reduction, was infeft in, and possessed the " estate of Murdostown for many years, on a title which left " him the legal right of selling and alienating the lands, and " thus placed the fee thereof at his own absolute disposal. 2d. " That Messrs. Bogle and Company obtained a decree of adju- " dication at their instance against the said Alexander Coch- " rane, for a just and onerous cause, but reserving all objections " *contra executionem*, in the year preceding his death, and when " he was in possession of the estate on the said title. 3d. That " Sir Thomas Cochrane, the Pursuer, has taken up the said " lands and estate of Murdostown upon a retour, as heir of his " father, under the titles whereon the latter possessed the " estate, and thus represents his father in all legal obligations, " which are effectual against the said estate under the titles; " and farther, that he is bound to give effect to all competent " real diligence, used by the Defenders against Sir Alexander " Cochrane, while in possession. 4th. That the Pursuer of the " Reduction has failed to show in this Action, that the said " decree of adjudication was in any respect unfounded in its " grounds, or exceptionable on its legal merits when raised, or " that his predecessor, Sir Alexander Cochrane, could have " successfully opposed the same, if he had survived to abide " the ultimate discussion of the said diligence. On these " grounds, Finds that there are no grounds for now recalling or " rescinding the said decree of adjudication, or for refusing " execution thereof: And therefore repels the Reasons of " Reduction, as hitherto urged, and assoilzies the Defenders, " Messrs. Bogle and Company, from the Action of Reduction " at Sir Thomas Cochrane's instance, and decerns."

The Respondent reclaimed to the Inner House (1st division), which ordered the papers to be laid before the other division and the Lords Ordinary, and thereafter, in conformity

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with the opinions of a majority of the consulted Judges of 7 to 2, the Court pronounced the following interlocutor, which was the subject of the appeal:—"In conformity "with the opinions of the majority of the whole Judges, alter "the interlocutor of the Lord Ordinary reclaimed against; "Sustain the Reasons of Reduction, and reduce, decern, and "declare in terms of the reductive conclusions of the libel."

Mr. Turner and *Mr. Inglis* for the Appellants. I. The only prohibition, in regard to contracting debt, is that the heirs shall not "burden or affect" the lands with sums beyond 8000 merks. This does not amount to a prohibition against contracting debt by personal obligation, but is confined to preventing the creation of a real debt or security over the lands; for whatever might be the effect of these expressions to prevent the contraction of debt, whether by real or personal security, did they stand alone, the context plainly shows that creation of real security was the only subject of prohibition, for the permission to "burden or affect" the lands with the specified sum of 8000 merks, and the declaration that that sum being "made a burden," no more "can be laid" upon the lands, cannot be regarded, according to the known use of these terms in law language, as having reference to anything but the creation of a real security, which would be complete in itself to affect or burden the lands. Accordingly, there is no mention in the irritant clause which immediately follows this prohibition of contraction of debt, of adjudications which might be led for attaching the lands in respect of personal debts contracted. The clause sets out with saying that "such debts," *i.e.*, debts secured by bond or real security so as to burden or affect the lands, shall be null; and then continues, that if the lands shall be adjudged for payment "thereof," *i.e.*, of the debts so secured, the heir shall be bound to purge the adjudication, otherwise he shall

lose his right. There is therefore neither prohibition, resolution, nor irritancy directed against the contraction of debt generally; and even if the prohibition and irritancy should be held to have reference to debts generally, there is no irritancy of adjudications which may be led for payment of them, nor is there any resolution of the right of the heir contracting the debt. All that is done is to declare that the heir shall redeem the adjudication for payment of the debt or lose his right; there is therefore only a resolution in case of the adjudication not being redeemed, but none in case of the debt being contracted.

II. The entail contains a prohibition against sale and alienation, and a resolution of the right of the heir contravening; but there is nothing to irritate the right of the contravener. The scheme of the deed is to make every prohibition perfect by itself. Accordingly, the prohibition against debt is followed by a resolution and an irritancy, such as it is, confined to debt alone; then comes this prohibition against sale and alienation, followed by a resolution also confined to them alone. Sale being thus disposed of, there follows a new provision as to using the arms of the entailer, followed by its resolution. That resolution has the words, "and the several clauses, provisions, conditions, and "declarations before written." It may be argued that these expressions have reference to all the previous prohibitions, and so give a resolution applicable both to sale and alienation, and to debt. But to give them such an application would be opposed to the general scope of the deed, which, as already observed, is to make each prohibition perfect by itself; and is opposed by this circumstance, that the provision as to the use of arms, which immediately precedes the words in question, is directed not to the general heirs under the deed, but to a particular class of them. The conveyance by the deed is to James Hamilton, and the heirs, "male or female," of his body, and to the heirs, "male or female," of several of the substitutes; but

this provision is directed to James Hamilton and his "heirs "male," and the "heirs male" of the other substitutes, and "the husbands of the heirs female."

III. There being no irritancy of sale or alienation, Sir Alexander Cochrane had in him *jus disponendi*, the great test of property. He might gratuitously, or for a price, have disponed the lands to any one whomsoever, and was to all purposes proprietor in fee simple. It Baillie *v.* Clark, 23rd February, 1809, 15 *F. C.* 211, a man infeft in liferent only, with a reserved power to sell and dispone, was held to be owner in fee simple; and in Dickson *v.* Dickson, *Mor.* 4,267, a bond taken to a father in liferent, and his son in fee, with power to the father to "uplift "and discharge," was found to belong to the father; and in Wilson *v.* Glen, where infeftment was taken to husband and wife, and longest liver of them, two in conjunct fee and liferent for her liferent use allenarly, and their son *nominatim*, his heirs and assignees in fee, with a reserved power of disposal to the father, the fee was found to be in the father in respect of the reserved power. If then Sir Alexander had the power to sell, his creditors must have a power to attach that right in him; otherwise the singular anomaly would be sanctioned of a person enjoying a fee which he could alienate voluntarily, but which his creditors could not attach. Whatever the debtor can convey, the law will attach.

[*Lord Chancellor.*—In the circumstances, the creditor never looked to the estate. There is no hardship upon him.]

It certainly is against the common law to allow an absolute control over property, and at the same time exempt it from liability to payment of the owner's debts.

[*Lord Chancellor.*—The law has been relaxed lately no doubt. But formerly there were few instances in which a creditor could attach his debtor's property.]

But the creditor could, by pressure, force the debtor to sell. In Kemp *v.* Watt, *Mor.* 15,528, Lord Braxfield said, "As in this

" case the heir of entail may sell, the creditors may force him to " sell." In Baillie *v.* Carmichael, *Mor.* 15,500, a personal creditor of the heir in possession was held entitled to make his debt effectual against the estate, because there was no irritancy of the debt. In Cathcart *v.* Cathcart, where a sale was defeated, the act was simulate, to defeat a prohibition against altering the order of succession; and the difference between that and a *bonâ fide* sale was carefully guarded against by the Lord Chancellor.

It is no doubt true, that all real debts through which the lands may be adjudged, are irritated, but the debt here was purely personal; and the effect of adjudging for payment is neither more nor less than to sell judicially for payment—it is a judicial alienation by way of sale, 1 *Bell's Illustra.*, 705 and 718. If the heir could sell voluntarily, the sale made for him by the Court should *multo magis* be effectual, for it rests on the same foundation as a voluntary sale. The operation of adjudication is to transfer to the creditor every right that was in the debtor. It is immaterial therefore that Sir Alexander Cochrane had died before the power of sale was executed for him, because before his death the right to make the sale had been transferred by the adjudications which compelled the exercise of the *jus disponendi*. This may be said to be a round about away of getting rid of the prohibition against selling, but that won't avail; in Oliphant *v.* Scott, 8 *Sh.* 985, a lease, specially prohibited, was nevertheless sustained, because there was a warrandice in it which went to make a debt against the heir, and there was an imperfection in the fetters against contracting debt. No doubt an heir cannot do a thing well prohibited, because there is another thing which is defectively prohibited, but he may do the act defectively prohibited, and so perhaps come to do the act effectively prohibited.

Mr. Bethell and *Mr. Rolt* for the Respondent, cited on the first point Adam *v.* Farquharson, 3 *Bell's App.*, 295; Lindsay

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v. Earl of Aboyne, 3 *Bell's App.*, 254; and upon the third point, *Stair* iii. 2, 8; Grindlay *v.* Drysdale, 11 *Sh.* 896; Anderson *v.* Nasmyth, *Mor.* 10,676; Brown *v.* Bower, *Mor.* 5,440; M'Kenzie *v.* Ross and Co., *Mor.* 275; Landale *v.* Carmichael, *Mor.*, 305; Ramsay *v.* Brownlee, *Kilk.* 3.

LORD BROUGHAM.—My Lords, This was a case which was heard immediately after the last, and some of the points proceeding upon somewhat similar grounds, we postponed the judgments in the one case until we should hear the other. I entirely agree with my noble and learned friend in the opinion he has given, and will not go further into the case than by reading the statement of his reasons, which expresses my opinion most clearly and decidedly. We postponed this case just as we did the other, in order that there might be no doubt whatever upon our minds afterwards, although we had little or no hesitation at the time. My noble and learned friend says—

"Lord Moncrieff has so plainly and distinctly, and with "such consequential brevity, expressed the opinion I have "formed in this case, that I should, perhaps, be best per- "forming my duty by declaring my adherence to what he has "so expressed, and it is not my intention to do much more. "I cannot, however, but observe upon the great evil of having "points long since decided, and properly considered as part "of the law, opened upon new discussions, and argued upon "the principles which led to such decision. Great litigation "and expense are uselessly incurred, and much of the valuable "time of the Court consumed; but, above all, that practice "leads to an apparent uncertainty in the law itself. These "observations appear to me to apply to several of the points "discussed in these papers. I cannot consider it a matter "open for discussion that an entail, failing to effectuate its "object as to some of the matters intended to be prohibited

" and guarded against, therefore fails as to others. It is true " that, indirectly, the others may be affected by the failure of " one, and an heir, not effectually prevented from selling, may " be induced, by the pressure of creditors, to destroy the " entail by the exercise of such a power. But that leaves " untouched the protection of the entail as against the acts " of the creditors themselves. Is was said, indeed, that an " adjudgment by a creditor was, in fact, a sale, but if that could " be maintained, that particular mode of sale is effectually " prohibited and guarded against. That the contracting a debt " which is permitted to affect the land is prohibited, cannot, I " think, be open to doubt. And if so, that particular act, " whether it be called selling or not, is effectually guarded " against by the irritant and resolutive clauses. It is, however, " impossible, in my opinion, to maintain the proposition that " the act of the creditor is a selling within the meaning of " that word, as used in this entail. I am, for these, amongst " other reasons, of opinion that the intercolutor appealed from " ought to be affirmed, with costs."

I have, therefore, to move your Lordships that this interlocutor be affirmed, with costs.

The opinion of Lord Moncrieff referred to, was in these terms: "There are certain points which must be taken to be clear:—

" 1. The prohibition to burden with debts is a good prohibi- " bition against contracting debts which can affect the estate. All " the cases, Nisbett, Burden, Vernor, show this, &c. &c. &c.

" 2. The prohibition is effectually secured by irritant and " resolutive clauses.

" 3. Though there is a defect in the irritant clause in rela- " tion to the prohibition to sell, that does not affect the validity " of the perfect restraint against debts. The case of Vernor is " conclusive on this, and was decided on solid grounds.

" 4. If debts are effectually prohibited, it is not necessary

" that there should be a special clause irritating adjudications on " them. If the debts are annulled, the adjudication on them " must be null also. It is the very point of the nullity.

" 5. It is perfectly clear to me, that the clauses obliging the " heir to purge any adjudication led, by paying the debt, relate " only to the debt of 8000 merks. It is so by the words simply " read; and is clearly so by the necessary and only meaning.

" 6. The only question remaining is—Is adjudication equi- " valent to a sale? I am clear that it is not. Whatever the " old apprising may have been in theory, I am clear that a " decree of general adjudication in modern law is no more than " *pignus prætorium*,—a step of diligence, which only creates a " security for debt. It is not the act of the debtor, but a " security taken by the act of the law. The debt remains " unpaid. The security may be abandoned, and other remedies " taken. The debtor is still the vassal. Even Erskine's doctrine, " taken with his qualifications, does not give a different result. " The other authorities are clear; such as President Campbell— " Eskgrove—Bell—Hume, and all the late cases, particularly " Drysdale, Mackenzie, &c. The cases as to special points,— " Interest—Prescription—are easily explained, though perhaps " not consistent in principle. But they do not alter the fixed " general rule. They arose from an unwillingness in the Court " to disturb such special matters which had been fixed in " practice.

" It is not necessary to resolve the supposed case of " sequestration. There is an erroneous assumption throughout " the argument, that where there is a defect in the irritant " or resolutive clause, the heir possesses in fee-simple. It is " not so: From the statutory defect, a sale made is effectual " to a third party purchaser. But correctly, the heir has no " right to sell, in violation of the prohibition. The Court has " repeatedly refused to entertain a declarator, to have it found " that he has even power to sell, unless a real sale has been

"actually made. If it were otherwise—that the power is "absolutely vested, and may be carried by sequestration as "part of the debtor's estate, this must now be competent "even after his death. But it will scarcely be maintained, that "the possibility of making an effectual sale, (for it is not pro-"perly a power,) could be taken up either by adjudication or "sequestration after a man's death.

"It has been decided, that creditors cannot force an heir in "possession to alter the succession, though that is not effec-"tually prohibited. This case is even stronger. And here the "very statement is, that Sir Alexander Cochrane refused to sell.

"I am therefore of opinion that the interlocutor of the Lord "Ordinary ought to be altered, and decree of reduction pro-"nounced in terms of the libel."

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party or parties entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful and necessary.

DUNLOP and HOPE—RICHARDSON, CONNELL and LOCH.

[HEARD 18*th*—JUDGMENT 21*st June*, 1850.]

JOHN BAIN, Esq., of Morriston, *Appellant.*

The WHITEHAVEN and FURNESS JUNCTION RAILWAY COMPANY, *Respondents.*

Process.—An objection that the minute of parties agreeing to close the Record, omitted in its specification of the Record the summons and defences in a supplementary action, was disregarded by the House.

Ibid.—An interlocutor closing the Record, written upon a separate sheet of paper, without any authentication having been made by the Judge on each step of the process, sustained as sufficient compliance with the Statute 6 Geo. IV. c. 120, sect. 10.

Ibid.—Exceptions.—Uuder a Bill of Exceptions, which objects to evidence upon a particular reason assigned it, is not competent to support the objection upon another reason not assigned.

Evidence.—A witness who had been a shareholder of the Company by whom he was called, but had parted with his shares before his examination, and had recorded the transfer in a temporary register, used in the period between the meetings of the Company at which the sealed register was made up, is not open to the objection of interest. *Semble.*

Ibid.—Surprise is not a ground of exception to the reception of evidence tendered at a trial, the exception being unaccompanied by any objection to the admissibility of the evidence, had there been no surprise.

Ibid.—The *lex fori*, not *loci contractus*, is that by which Courts must be governed, in determining as to the admissibility of evidence.

Statute—Railway Acts.—Those clauses in the Railway Acts in regard to the books of the Companies being evidence of partnership against the shareholders, are imperative, and not merely directory, as to the mode in which the books are to be kept.

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Statute—Railway Acts.—The numbers of a partner's shares in a Railway Company, need not each be stated in the register of shareholders where the numbers are running, but are sufficiently distinguished by stating the first and the last numbers of the series, and placing the word "to" between them.

Ibid.—Ibid.—The amount of money paid by a railway shareholder upon the shares held by him, is sufficiently stated in the register of shareholders, by placing the aggregate amount paid on all the shares held by him opposite a circumflex of these shares.

THE Respondents, a Company which was formed and is domiciled in England, brought an action against the Appellant, alleging that he was the proprietor of 565 shares of their stock, and that a variety of calls of capital upon these shares had been duly made on him, but had not been answered, and concluding for payment of the calls.

The Appellant pleaded in defence that he was not a shareholder; that the calls had not been legally made, and proper notice of them had not been given to him; that the requisites of the statutes under which the Respondents' Company was constituted had not been observed, and therefore they were not entitled to recover.

The summons and defences in this action were marked by the Clerk of Court respectively 1 and 11 of process.

Subsequently, the Respondents brought another action against the Appellant for another call, which had been made upon him after the date of raising the first action. The Appellant put in the same defences to this action as to the first. This new summons and defences were marked by the clerk respectively 14 and 17 of process.

On the 6th of February, 1849, these two actions were conjoined, and an issue was directed to try the question between the parties in the following form: "Whether the said John Bain "was, at the dates of making the calls after-mentioned, respec-

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"tively. The holder of 565 shares of the Whitehaven and "Furness Junction Railway Company, and is indebted and "resting owing to the Pursuers in the following sums, or any part thereof viz.:" then followed a specification of the calls, including that embraced by the second action.

After this issue had been adjusted, a minute agreeing to close the Record was signed by the counsel for the parties, upon a separate sheet of paper on which the interlocutors in the cause had been written, in these terms: "We, the counsel for the parties "agree to close the record on the summons and defences No. "1 & 11 of process." Underneath this minute the usual interlocutor closing the record was written and signed by the Lord Ordinary; but no minute or writing of any kind was put upon any steps of the process to identify them as forming part of the record.

The parties then went to trial upon the issue which had been adjusted. At the trial, the Respondents called John Meyer, the Secretary of their Company, as a witness. In his examination *in initialibus*, Meyer said he was not a shareholder; he had sold in December, 1849 (the trial taking place in January, 1850); that the transfer was not yet entered in the transfer book, but it would be entered in the half-yearly register. It was recorded in the supplementary register of shareholders which was not yet sealed, but was kept in the interval between the meetings at which the completed register was sealed, and it would be copied out before the next half-yearly meeting into the register book, and duly sealed. Whereupon the counsel for the Appellant objected to the examination of Meyer, on the ground that he was a partner of the Respondents' Company, and had not legally transferred his shares to any other party; but the Judge overruled the objection, and thereupon the Appellant tendered his *first* Exception.

The Respondents, in order to prove that the Appellant was the holder of the shares stated in the issue, tendered three

books, which bore the title "Register of Proprietors," and contained each of them the following entries:—

Register No.	Name.	Residence.	Description.	No. of Shares.	Numbers.		Amount paid to Aug. 26, 1847.
					From	To	
320	Bain, John	of Moriston, in Glasgow	Esq.	50	1,551	1,600	3390
				25	8,470	8,494	
				5	8,765	8,769	
				15	8,770	8,784	
				7	11,974	11,980	
				5	12,031	12,035	
				8	12,046	12,053	
				10	12,064	12,073	
				20	12,299	12,318	
				50	15,319	15,368	
				20	13,484	13,503	
				100	13,374	13,473	
				250	13,514	13,763	
				565			

The Appellant objected to the reception of these books, upon four grounds, First, because they were not titled "Register "of Shareholders;" Second, because they did not distinguish each share by its number, or the total number of shares held by the Appellant; Third, because they did not show distinctly the amount of subscriptions paid on each of the shares held by him; Fourth, because his name was not entered in a proper manner to distinguish him as the holder of the shares mentioned in the issues, and the entries opposite his name were made in an informal and irregular manner. The Judge repelled these objections, and thereupon the Appellant tendered his *second* Exception.

The Respondents then, in order to prove the calls stated in the issue, tendered a variety of letters bearing the printed signature, "John Meyer, Secretary," and proposed to prove by the evidence of English Counsel, that documents of that

description did not require to be signed, and at any rate that a printed signature was sufficient. Thereupon the Appellant "objected to the evidence proposed, on the ground of surprise, "in respect that English law was not averred or mentioned "on the record. The Counsel for the Pursuer, however, did "insist that the proposed evidence was competent and admis-"sible, and the said Lord Justice Clerk did repel the objection "preferred by the Counsel for the Defender, and allowed "English Counsel to be examined as a witness." Thereupon the Appellant tendered his *third* Exception.

Of these Exceptions the first was given up at the bar of the Court below, but the second and third were fully argued, and after argument, were disallowed by the interlocutor, which was the subject of appeal.

Mr. Turner and *Mr. Anderson* for the Appellant.—The interlocutor appealed from ought to be reversed because the record was not prepared and authenticated in the manner required by the statute. The minute signed by counsel bears express reference to the first summons and defences, Nos. 1 and 11 of process, as being alone the record which they had agreed to close, but the issue embraced the call for which the second action had been brought, the record as to which were Nos. 14 and 17 of process. The 7th section of the 6th Geo. IV, c. 120, requires the parties to state whether they are willing to hold the summons and defences as containing their full and final statement of facts, and that their counsel shall sign a minute to that effect. This had not been complied with in regard to the second action, for no such statement had been made in regard to it. *Expressio unius est exclusio alterius.*

If this objection could be got over, the objection would remain that the 10th section of the same statute had been disregarded as to both of the actions, first as well as second

That section requires that "the record of the pleadings, as "adjusted, shall be authenticated by the Lord Ordinary by "his signature." This could only have been done by the Lord Ordinary signing each step of the process—without this there was nothing to identify any particular step as forming part of the record to which the interlocutor referred.

[*Lord Brougham.*—In English pleading, if a party plead a plea of not guilty, which is a nullity, and the other goes to trial without signing judgment, as for want of a plea, or demurring to the plea as informal, the verdict cures all, and he can't afterwards move in arrest of judgment.]

That is not statutory. The statute here declares that there shall be no order or judgment delivered until there is authentication. In Wilson *v.* Wemyss, 6 *Bell*, 394, the House refused to give any judgment upon the merits, because the interlocutor below had not complied with the statute in that behalf. In Dallas *v.* Fraser, 11 *Co. of Sess. Ca.* 1058, the Court held it incompetent even to dismiss a summons as irrelevant, until the record had been prepared. In Parish of Lasswade *v.* Charity Workhouse, 6 *Co. of Sess. Ca.* 637, every step of the process which formed part of the record was authenticated as such by the Lord Ordinary, and the necessity for this was fully recognized by the Court. And in Arbuthnot *v.* Thom, 26 *Mor.* 1130, the Court refused to allow the parties to cure the objection taken by the Court that the record had not been closed.

[*Lord Brougham.*—May you not waive the objection of want of jurisdiction?—Can't you give it by prorogation?]

In Forest *v.* Harvie, 4 *Bell*, 197, the proceedings were held to be void because the warrant of citation was signed by the Clerk of the Magistrates instead of the Clerk of the Justices.

[*Lord Brougham.*—There there was no jurisdiction originally by any means.]

If the record may be closed at any time, or the defect cured

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by consent, there would cease to be any use in closing at all and the statute would in time be rendered nugatory.

The Respondents were heard in answer upon this preliminary objection, and afterwards it was intimated by Lord Brougham, the Peer on the Woolsack, that the House did not consider the objection of any weight, but no formal judgment was pronounced. On the following day the case proceeded on the merits.

The First Exception regards the reception of the evidence of the witness Meyer.

[*Mr. Butt* for the Respondents submitted, that as the Appellant had given up this objection in the Court below he was not entitled to be now heard upon it.]

In Burnes *v.* Pennel, 6 *Bell*, 541, it was held that the Appellant might argue an objection which had not been taken by him in the Court below.

[*Lord Brougham.*—There is a great difference between abandoning and never taking an objection.]

In Luke *v.* Mags, of Edinburgh, 8 *Will.* and *Sh.*, 241, the House allowed a question to be argued which had been raised by the pleadings, but had not been argued before the Court below.

Meyer admitted he had been a shareholder, but said he had executed a transfer of his shares. Till, however, that transfer had been entered in the books of the Company and the name of the Transferee appeared there as the shareholder, Meyer continued the shareholder as between him and the world. The 36th sect. of the Company's Clauses Consolidation Act gives a right of execution against shareholders, and a right to inspect the register for the purpose of discovering who bear that character. Any creditor, therefore, seeing Meyer's name upon the register might have sued him effectually. No doubt the 15th sect. says that shareholders shall continue liable until the transfer of their shares are delivered to the Secretary and a certificate is endorsed by him, leaving the inference that after

this is done the liability is at an end; but that is only as between the Transferer and the Transferee. As between the world and the Transferer the latter continues liable until the name of the Transferee is substituted for his upon the register Meyer continued a shareholder, and as such his evidence was not admissible.—Padon *v.* Bank of Scotland, 3 *Sh.*, 250; Margs. of Earlsferry *v.* Malcolm, 7 *S.* & *D.*, 755.

Second Exception.—The books of the Company are not at Common Law any evidence *per se* of their contents, in favour of the Respondents. They are made so by the Company's Clauses Consolidation Act, 1845, which, in its 28th sect. declares, that the "Register of Shareholders" shall be *primâ facie* evidence in "favour of the Railway Company." In order to have the benefit of this enactment the Company must have complied strictly with the terms of the statute in regard to the form and mode of keeping the register, as was decided in Birkenhead Co. *v.* Brownrig, 13 *Jur.*, 943; and in Davidson *v.* Gill, 1 *East*, 64, where an order of Justices stopping up a way was held to be invalid because its form was not precisely that given in the schedule of the statute under which the Justices derived their power. Now the 9th sect. of the Company's Clauses Consolidation Act is in these terms:—"The Company shall keep a "book, to be called the 'Register of Shareholders;' and in "such book shall be fairly and distinctly entered, from time to "time, the names of the several Corporations, and the names "and additions of the several persons entitled to shares of the "Company, together with the number of shares to which such "shareholders shall be respectively entitled, distinguishing "each share by its number, and the amount of the subscriptions "paid on such shares, and the surnames or corporate names of "the said Shareholders, shall be placed in alphabetical order; "and such book shall be authenticated," &c. This provision was disregarded in the ways which were stated on the trial. 1st. The title of the book which was tendered to prove that the

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Appellant was a shareholder was not that which the statute prescribed. The title prescribed was "Register of Shareholders," but that used was "Register of Proprietors." It may be very true that in the interpretation clause "Shareholder" is declared to mean "Proprietor:" but it is not there declared that "Proprietor" shall mean "Shareholder. It is only persons who have complied with the 8th sect. of the statute by paying the subscribed sums and having their name entered in the Register of Shareholders who are to be considered as "Shareholders," but there may be many persons who have acquired right only to scrip-certificates which they have not returned. These persons would be "Proprietors," although they would not be shareholders, under the 8th section. 2d and 3d. The Register book does not show that the Appellant was proprietor of 565 shares, describing them by their numbers in the way in which the statute prescribes, neither does it show the amount of money paid in respect of each individual share, as was obviously the direction of the statute. The object of the Legislature in making the provision was to protect the public against the shareholders and the shareholders against each other by enabling them to trace the possession of every individual share and its actual value at any given time. This is well seen by attending to the terms of the 36th clause of the Company's Clauses Act. The terms of that clause are, "If "any execution, either at law or in equity, shall have been issued "against the property or effects of the Company, and if there "cannot be found sufficient whereon to levy such execution, "then such execution may be issued against any of the share-"holders to the extent of their shares respectively in the "capital of the Company not paid up; and for the purpose "of ascertaining the names of the shareholders and the amount "of capital remaining to be paid upon their respective shares it "shall be lawful for any person entitled to any such execution "at all reasonable times, to inspect the Register of Shareholders."

Now, with a register kept in the way in which the one in question was, it would not have been possible for a creditor to obtain the information which this section intended to put within his reach.

Third Exception.—It was not competent to allow the evidence of English counsel to show that the minutes authorizing calls, and the letters making the calls, did not require to be signed. The law of the *forum* was that alone which should have been considered in regard to the nature of the evidence to be allowed. Yates *v.* Thomson, 3 *Cl. & Fin.*, 544; Don *v.* Lipman, 2 *Sh. & McL.*, 682.

[*Lord Brougham.*—Do you object more on the record than surprise?]

The exception was to the examination of the witness. The reason now assigned for the objection may not then have been present to the minds of the party's advisers, but there is no ground for saying that a bad reason having been assigned, a good one shall not be inquired into. The main objection is to the reception of the witness. The reasons for this may be various and different. Even if the reason assigned, viz., surprise, were to be now argued, the objection would still be to the admissibility of the witness, or to the result at which the Judge arrived when allowing the examination. It is not competent to except to the steps by which the Judge arrives at the result, but it is competent to except to the result itself upon any ground which can be assigned. Here the law of England was quite foreign to the matter, whereas if the question had been determined upon the law of Scotland, the objection to the evidence must have been sustained;—that was so ruled upon the trial of a case with the Great Northern Railway Company, where the same question occurred; and that ruling was consistent with the terms of the statute. By the 22nd sect. no form of call is prescribed, but by the 139th sect. it is enacted that "every summons, notice, "or other such document, requiring authentication by the

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"Company, may be signed by two Directors, or by the Trea-
"surer or the Secretary of the Company, and need not be
"under the common seal of the Company, and the same may be in
"writing or in print, or partly in writing and partly in print."

[*Lord Brougham.*—That means, that what is common to every one of the instruments mentioned may be in print, and what is particular to any one of them may be in writing?]

We submit not. What the statute looks to is authentication, but a printed signature would not give any authentication.

Mr. Butt and *Mr. McFarlane* for the Respondents.

LORD BROUGHAM.—The two points which are chiefly for consideration in this case are upon the Bill of Exceptions. The main contention between the parties resolves itself into this; the second exception, upon the ground of evidence being admitted which ought to have been rejected, and the third head of the first exception upon the want of distinct statement of the amount of subscription paid on the shares. Mr. Butt, will you refer me to the part of the Clauses Consolidation Act upon which you rely, to which the third exception applies, that the books don't show the amount of the subscriptions?

Mr. Butt.—It is in the 9th section.

Lord Brougham.—And which is the Evidence Clause?

Mr. Anderson.—The 28th Clause provides that the register is to be *primâ facie* evidence.

Lord Brougham.—The 28th Clause provides that the production of the register shall be *primâ facie* evidence of such Defendant being a Shareholder, and of the amount of his shares. I was anxious that you should be both here because my judgment goes on a very narrow point as to the construction of the Act, but it is very material.

My Lords, the first point we have to consider, is as to the reception of the evidence of an English counsel that documents

of this description do not require to be signed, and at any rate that a printed signature is sufficient "whereupon the Defender, "the present Appellant, objected to the evidence proposed on the "ground of surprise in respect that English Law was not averred "or mentioned on the Record."—The ground of surprise therefore is the only ground of his exception up to this stage. Let us see whether that ground is enlarged. "The Counsel for the "Pursuers however did insist that the proposed evidence was "competent and admissible, and the Lord Justice Clerk did repel "the objection preferred by the Counsel for the Defender and "allowed English Counsel to be examined as a witness."

Now what objection is it that the Lord Justice Clerk repelled, and his repelling which is the sole ground of this exception? It is the objection preferred by the Counsel for the Defender; What is the objection preferred by the Counsel for the Defender? The Counsel for the Defender says he shall object to the evidence proposed on the ground of surprise in respect of the English Law not having been averred on the Record.

Then that was the ground of his exception, and it is necessary by law that when a party objects, be it to the receiving of evidence, be it to the rejection of evidence, be it to the direction of a learned Judge to the Jury, whatever is the subject matter of his exception, he must state the ground of his exception, otherwise he cannot except. It is not enough for a party to say "I except to the receiving of A. B's. evidence," or "I except to "the rejection of A. B's. evidence," or "I except to the first "passage in the charge or direction of the learned Judge to the "Jury." If he objects to A. B's evidence, he must show why he objects to it, as by stating that A. B. is an incompetent witness. If he objects to the rejection of A. B's evidence, he must show why he objects to its being rejected; he must state that A. B. is a competent witness and that the rejection of him was not good in law. If he objects to the learned Judge's observations to the Jury, he must state, not merely that he objects, but he

must state on what ground he objects; that it is contrary to law to give such directions, and therefore he objects; he must show distinctly and specifically the ground of his objection. In all those cases therefore, the ground of the objection must be stated, and beyond the ground of the objection the Court is not bound to look at all. Even if an unnecessary specification of the ground of objection be made, beyond that specific ground the Court is not to look. The only question for it is the objection on the stated ground.

Now, my Lords, the ground of the objection to the evidence proposed was surprise and surprise only; not that the evidence was inadmissible (*per se*) but that it was inadmissible because it had not been notified properly on the record. It was surprise and surprise only. The Court held that surprise was no sufficient ground of objection, overruled the objection, and therefore repelled the exception.

But, say the learned counsel for the Appellant, the counsel for the Pursuer did insist that the proposed evidence was competent and admissible. No doubt he said it was competent and admissible. But this was only a reiteration of his tendering the evidence. "And the said Justice Clerk repelled the objec-
"tion preferred by the counsel." What objection? Not a general objection to the evidence as inadmissible, but an objection, that though admissible, he had had no notice upon the record; that is, he was taken by surprise. Consequently, that which the Lord Justice Clerk did, was, not to repel an objection to the evidence as inadmissible generally, but to repel an objection to the evidence, whether admissible or not, as taking them by surprise. On this ground, therefore, I am perfectly clear that they are shut out from their objection, because the only ground taken was surprise, and surprise is no ground; indeed, it has hardly been taken now.

The English counsel was then allowed to be examined; whereupon the counsel takes the third exception, but it really is

the second. "The counsel for the Defender did then and "there, on his behalf, object to the aforesaid opinion of the "Lord Justice Clerk, and did tender his exception accordingly." Not the opinion allowing English counsel to be examined; but the opinion of the Lord Justice Clerk, that surprise was no ground, for that (taking the whole together) is his Lordship's opinion, that surprise was no ground; and therefore the evidence was inadmissible.

Now, I have considered the only case which was given to me to consider on this point; and I am of opinion that it does not apply, for the reason I threw out to the Bar. I very much regret that this clumsy mode of proceeding has been adopted in the Court below. There has been a slip on the part of the learned counsel for the Appellant in the Court below; they ought to have taken their objection, not on the ground of surprise, but on the irrefragable ground, that the testimony was no evidence, and not anything like evidence. And I am sorry that we cannot go into that here. I am sorry that your Lordships have not the opportunity of setting the Court below right on a most important point. For it is not merely on this case that the point bears, but it is a point of general importance. The Court of Session has gone against all the principles of the law in this country on the subject—the principles of the law of evidence—which, unless in certain excepted cases, they generally profess to go by. They have gone directly against those two important cases—Scottish cases decided here on appeal—Donne *v.* Lipman, and Yates *v.* Thompson; the latter, indeed, turning on facts closely resembling those in this case.

The case of Donne *v.* Lipman was on the Statute of Limitations; Yates *v.* Thompson was on all fours with this case; and it is perfectly evident that these cases are the law of the land on the subject, and only follow the law which had been clearly laid down in the Court of Queen's Bench, and particularly in the Court of Common Pleas in well-known cases, one

especially which draws the distinction between the *lex loci contractus* and the *lex fori*, and lays it down that the *lex loci contractus* is to be the governing rule in all contracts between parties, and in all transactions regarding personal property, and not affecting real property; and that the *lex fori* is to govern trials respecting real property. For instance, in the case of a foreigner domiciled abroad making a will disposing, or assuming to dispose of real estate in this country, the will must be made according to the real property law of this country; and the law of the country where he is domiciled is totally inapplicable to the case. On the other hand, in a personal matter, the *lex loci contractus* rules entirely the disposal of that property, not only in the country where the contract is made or sought to be executed, or damage sought to be recovered for its non-execution, but also in the courts of this country. These courts are bound by the foreign law, which must to them be matter of fact. But it is a totally different thing as to the law of evidence. The law of evidence is the *lex fori* to govern the courts. Whether a witness is competent or not; whether a certain matter requires to be proved by writing, or not; that is to be determined by the law of the country where the question arises, and the court sits to try it; that is, therefore, termed the *lex fori*.

The only point in Donne *v.* Lipman that required to be settled, was, whether the Statute of Limitations (or, as it is called in Scotland, Prescription), is *lex fori* or not. One party contended that it was part of the *lex loci contractus*, admitting that if it was *lex fori*, their case was gone. But we held that the Statute of Limitations or Prescription was parcel of the *lex fori*. I held it to be quite clear, and your Lordships determined the case on the ground that it was parcel of the *lex fori*.

In Yates *v.* Thompson there was no doubt entertained upon the subject, and the rule was clearly laid down.

Now, quite contrary to this rule, the Court of Session has proceeded here against all principle and all authority. The objection on the ground of surprise was rightly overruled. But the evidence was wholly inadmissible, and should have been rejected at the trial, whether objected to or not.

I trust, therefore, that while it is known that we affirm the judgment on this point, it will also be understood upon what ground we affirm, namely, because this objection was not taken below, for if it had been taken it must have prevailed. The learned Judge who tried the case should not have allowed such evidence. The Court, on the Bill of Exceptions, was of course confined to the question of surprise, raised, and alone raised, on the record. Though some of their Lordships, by a manifest oversight, consider the question of admissibility generally to be before them, which it was not, and gave an erroneous opinion on it, deeming the evidence admissible.

But now see the consequence of not taking the objection, and see how impossible it is for us to overleap the bounds by which I have now stated we are limited. Were we to take this objection now, it would be said, "If this objection had been "taken below, instead of the party confining himself to surprise "as the ground of objection, *non constat* that the Court would "have allowed the evidence, and then there would have been "no ground of exception; or *non constat* that the Respondents "would not have withdrawn the witness, and there would have "been no ground of objection; or *non constat* that they would "not have put up another witness, and proved their point "*aliunde* in an unexceptionable way."

That leads me to the conclusion, which I advise your Lordships to adopt, namely, to overrule the exception and support the decision below, on the ground, not that the exception could not have been taken, but, on the contrary, that it has been wrongly taken, or taken upon a wrong point, when, had it been taken on the right point, it was invincible.

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Then we come to the only point which seemed to me to require much consideration. I do not think, upon the whole, it can be contended that the books omitting to distinguish each share by its number is a sufficient objection.

You are not to give a construction to this part of the statute that would make it so absurd as to require, that if a man has a thousand shares, there must be a thousand lines stating his shares. If every one of his shares stands in the same predicament, there is a substantial compliance with the statute.

At the same time one part of the exception says, "Because "the books do not distinguish each share by its name (that I "have dealt with), or the total number of shares held by the "Defender." I apprehend, Mr. Anderson, they do state the total number of shares held by the defender?

Mr. Anderson.—You must go through an arithmetical operation to arrive at it.

Lord Brougham.—But you can do it with a very little arithmetic. But what did really operate with me was the third ground of exception—"Because the books do not show dis-"tinctly the amount of subscriptions paid on the shares held by "the Defender." Now if I had certainly found that this was not distinctly set forth, my opinion would have been in favour of the Appellant; because it is most important that everything should be done which the statute (8th and 9th Vict., chap. 16) requires to be done; and for this reason. A great privilege is bestowed by the Act upon the Company, neither more nor less than the privilege of making evidence for themselves. They are allowed to make their own books evidence, which, unless it is rebutted by counter-evidence, shall give them the verdict in each case. That is a very great privilege, as must be admitted on all hands. By the rules of evidence, and the rules of common sense and justice, what a man writes is always evidence against him, but no evidence for him. But here is a case in which what he writes is made evidence for him, and against his adversary. So

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that by writing in my books, "A. B. holds a certain number of "shares," I go into Court and make A. B. answerable for those shares, and produce my own entry in my own book as evidence against him, and for me. That is a great privilege. Therefore I think the directions of the statute must be most strictly complied with whenever Companies are in possession of that extraordinary privilege; and I hold that it is much safer to consider each of those directions or conditions precedent as imperative, not directory, on account of the great importance of the privilege, and on account of its being an exception to all ordinary rules. Therefore, if I had found that there was not a distinct compliance with the requisition of the other section (sect. 16), I should not have considered that sect. 28 availed to the applicant in making his books evidence for him and against his adversary.

Let us, then, look at the terms of the 9th section: "The "Company shall keep a book, to be called the Register of "Shareholders." Now I do not see any force in the objection that it was called a Register of Proprietors, because it seems quite a sufficient compliance with the terms of the section; and Mr. Butt, I think, will agree in waiving that objection, and confining himself to the others: "And in such book shall be fairly "and distinctly entered from time to time the names of the "several corporations, and the names and additions of the "several persons entitled to shares in the Company, together "with the number of shares to which such shareholders shall be "respectively entitled, distinguishing each share by its number." My opinion goes upon a very narrow ground, and you will presently see it is upon a single letter, "distinguishing each share "by its number, and the amount of the subscriptions paid on "such shares," in the plural, "and the surnames or corporate "names of the said shareholders."

Now I freely confess, so disposed am I to look at the strict execution of this direction as a condition precedent to the enjoy-

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ment of the extraordinary privilege conferred by sect. 28 of making a man's own writing evidence against another party and for himself, that if, instead of being "share*s*," in the plural, it had been "share," in the singular, I should have advised your Lordships to give judgment in favour of the Appellant; for then it would have been, "And distinguishing each share by its "number, and the amount of the subscriptions paid on such "*share*, and the surname," and so on. But it is not so. It is "the amount of the subscriptions paid on such *shares*"—that is to say, you must have the number of shares. That carries you back from the last antecedent in the singular, "distinguishing "each *share*," to the previous antecedent which is the number of shares which such shareholder holds, distinguishing each share by its number. Now I think each share is sufficiently distinguished by its number to give almost a formal, certainly a most substantial, compliance with the direction. When you put "No. 1,551 to No. 1,600," which is fifty shares in succession held by Mr. Bain, each share is distinguished by its number, because anybody reading that must know that 1,551 is the first, 1,552 is the second, and 1,600 is the last of that parcel; and then come the other parcels, each of which he appears to have held by a different title.

Then comes 3,600*l.*, which at first I was disposed to consider in favour of the Appellant's contention, because it gives a lumping sum together, and does not distinguish what is applicable to each share. But I do not think that can be taken advantage of, especially in the Court of last resort. I am not at all sure that if this case had been decided the other way I should have recommended your Lordships to have reversed the decision. But I do not think there is sufficient ground to recommend your Lordships to reverse as it now stands: it is one of those cases in which the point is so narrow. But it is very well for the party who has possession of the judgment. It is a case in which, if it had been the other way, we should not have interfered to

reverse it. Therefore I shall move, your Lordships, that this appeal be dismissed, and I shall consider the question of costs.

Have you anything to suggest, Mr. Butt, on the question of costs?

Mr. Butt.—If I might take the liberty of suggesting, my Lord, I was going to suggest very respectfully to your Lordships that there is on the merits here no real defence.

Lord Brougham.—I am quite aware of that. I stated so at the hearing. You are quite right. Mr. Anderson, you have not a leg to stand upon as regards merits.

Mr. Anderson.—We cannot get into the merits, my Lord.

Lord Brougham.—You never could have got into them with any advantage to yourself.

Mr. Butt.—They went to the jury on the point.

Mr. Anderson.—You proved your case against us. There is a little difference in the second appeal, my Lord; your Lordships will remember that the second appeal brings up a final judgment decerning against the Defender for the amount.

Lord Brougham.—It does not raise the other point, it makes no difference.

Mr. Anderson.—Your Lordships will remember that there was a motion for a new trial; the Counsel for my party wished that motion to stand over till your Lordships' judgment on the Bill of Exceptions should be given. That point of the admissibility of evidence would have been available on the motion for the new trial.

Lord Brougham.—Suppose we had given the judgment before, how could you have taken advantage of it?

Mr. Butt.—They would not go on with their motion, my Lord.

Lord Brougham.—I know that.

Mr. Anderson.—But I think it was quite reasonable that the motion for a new trial should not go on until your Lordships

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had disposed of the Bill of Exceptions, which we were aware is privileged by statute to be heard in four days after the cases are ready. The invariable practice hitherto has been where there has been a motion for a new trial and a Bill of Exceptions, to delay the motion until the Bill is decided.

Mr. Butt.—I am instructed, my Lord, differently.

Mr. Anderson.—We have the Record here. At page 61 your Lordship sees what took place. There is a motion that the Court should not take up the motion for the new trial, until this case was disposed of.

Lord Brougham.—Does your proposition go to affect the judgment on the appeal?

Mr. Anderson.—My proposition was, that the judgment should be recalled, and the Court below should be directed to dispose of the motion for the new trial.

Lord Brougham.—There is no ground for that, there have been proceedings enough; the case was not one of a conscientious defence at all.

Interlocutor affirmed with costs.

DODDS and GREIG—R. and W. G. ROY.

[HEARD 25*th*—JUDGMENT 26*th June*, 1850.]

THE RIGHT HON. JAMES, EARL OF GLASGOW, and MESSRS. JOHN WILSON and SON, Coal and Lime Masters at Hurlet, *Appellants.*

THE HURLET and CAMPSIE ALUM COMPANY, *Respondents.*

Process.—Bill of Exceptions.—Record.—It is irregular in preparing a formal Bill of Exceptions, for the Judge to make any alteration upon the Exceptions, as they appear by the note of them tendered by the party, and signed by the Judge, during the progress of the trial.

Ibid.—Ibid.—Ibid.—It is not competent for a Court of Appeal to look at any other Bill of Exceptions than that which has been certified by the Judge to be the Bill which was tendered by the party, however strong the evidence may be that it contains an alteration of that which actually was tendered.

Mines and Minerals.—Landlord and Tenant.—Where a lease of a particular mineral, existing in one and the same mine along with other minerals, gives the tenant a right of working it in the way most profitable and convenient for him, he will not be restrained from working in the way he thinks most beneficial, by the circumstance that that way of working will prejudice the interests of a tenant of the other minerals, by lease made subsequently to his.

THIS was an appeal from an interlocutor of the Court of Session, disallowing a Bill of Exceptions tendered at a trial of issues framed for the purpose of ascertaining the rights of the parties in working veins of coal and alum in a mine, wherein the coal formed a substratum to the alum. The question in dispute being, whether Messrs. Wilson, the lessees of the coal

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under the Earl of Glasgow, were entitled to work the coal which had been left as pillars for the mine, the coal in the mine otherwise being wrought out, or whether the Respondents, the lessees of the alum ore also under the Earl of Glasgow, were, by the terms of their lease, entitled to require that the pillars of coal should be left, so as to keep the wastes of the mine open, and the superincumbent alum undisturbed.

Before going into the merits of the question raised by the appeal, the Appellants raised a new question, which did not appear upon the Record, viz.:—Which was the true Bill of Exceptions? the one upon the Record, written on parchment, signed by the Judge, presented by him to the Court, and adjudicated upon by the Court; or one written upon paper, signed by the Judge, both at the foot and upon the margin, marked by the Clerk of Court as a number of process, but not presented by the Judge to the Court, nor adjudicated upon by it?

The circumstances out of which this state of things arose, rested, of course, entirely upon the statements of Counsel, and were as follows. The trial took place on the 3rd of April, 1849. Immediately the Judge had given his charge, the Appellants wrote out a note of two exceptions to it, which were read in presence of the Jury and handed to the Judge. The Judge made some alterations upon the paper, and then returned it to the Counsel for the Appellants, with a certificate at the foot of it signed by him in the terms required by the statute.

This document was in the following terms:—

"Note of Exceptions *in causâ* Hurlet &c. Alum Coy. *v.* "Lord Glasgow, &c.—Hurlet &c. Alum Company *v.* Lord "Glasgow, &c.

"The Defenders excepted—

"1. In so far as his Lordship directed the Jury, in point of "law, that, according to the sound legal construction of the "contract, it gives the Pursuers the right, throughout its endu- "rance, to prevent the landlord, or his tenant in the coal, from

"removing the pillars in so far as necessary to support the "roof, though all the solid coal should be wrought out.

"2. In so far as his Lordship declined, when requested by "the Defenders, to direct the Jury, in point of law, that there "is nothing in the contract of 1800, or in the leases of the coal "to the Defenders, Messrs. Wilson and Son, and their prede- "cessors, to bar the Earl of Glasgow, or any person deriving "right from him, to work out the pillar coal in a fair and "regular manner, after the solid coal is exhausted.

"*3rd April*, 1849. J. IVORY."

After the trial had ended in a verdict for the Respondents, various meetings of the parties took place, in presence of the Judge before whom the cause had been tried, with a view to adjust the formal Bill of Exceptions by the insertion of the evidence, oral and documentary, and of the technical parts proper to such an instrument.

In the month of November following, the agents for the Appellants got the proposed Bill of Exceptions printed, and sent a proof of it to the Judge in a letter, requesting him to sign it.

The Judge refused to sign the proof so sent to him, without the insertion of the following passage as an introduction to the exceptions.

"Thereafter the said Lord Ivory, in charging the Jury, did "state, as the sound legal construction of the contract or lease "1800, that the said contract gives right to, and entitles the tenant, "throughout its endurance—(and so long as there should exist, "in the pits or wastes comprehended in the said contract, alum "ore unexhausted and workable, being part of the subject "thereby conveyed or let,)—to prevent the landlord, and all "deriving right through him, from removing the coal pillars "in the said pits or wastes, (in so far as these were necessary "to support the roof of said pits or wastes, and thereby to pre-

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"serve the requisite access for working the said alum ore); and "that it mattered not, as regards this question of construction, "and the rights of the tenant of the alum ore in respect of "the same, whether the solid coal in the said pits or wastes "should or should not have been previously wrought out;— "And the said Lord Ivory did proceed accordingly to direct the "said Jury in point of law."

This passage the Judge considered necessary to the proper comprehension of the charge he had delivered to the Jury. But he said that he would be ready to hear judicially any motion upon the subject, but he declined being a party to any correspondence on it.

The agents, on the 26th of November, presented a paper in the form of a note, praying the Judge to appoint a time for adjusting the Bill of Exceptions. On the 28th of November the Judge was attended by the parties, when, after some discussion, he intimated his determination that the passage objected to should be retained, but his willingness to make a verbal alteration suggested by the Appellants. This alteration was made. Thereafter the Appellants transmitted a fresh proof of the Bill to the Lord Ordinary, with the objectionable passage restored. In this form his Lordship signed the Bill, making the conclusion of it in the following ordinary terms, viz.:—

"Whereupon the said Counsel learned in the law for the "said Defenders, did then and there propose the aforesaid "exceptions to the directions of the said Lord Ivory, and did "request him to sign this Bill of Exceptions, according to the "form in the statute in such case made and provided; and "thereupon the said Lord Ivory, at the request of the said "Counsel for the Defenders, did sign the said Bill of Excep- "tions pursuant to the said statute, on the 29th day of Novem- "ber 1849 years, and in the 13th year of her present Majesty's "reign. J. IVORY."

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The Bill thus framed was presented by the Lord Ordinary to the Court. At the hearing of the exceptions the Appellants renewed their objection to the paragraph before alluded to, and argued that the Court, in determining upon the exceptions, should lay it out of view. The Court refused to do this, holding that they were bound to treat the whole Bill as the true Record, and after hearing the parties, they disallowed both the exceptions.

The Appellants then presented their Petition of Appeal, in which they stated that they were advised that the interlocutor complained of was contrary to law, and prayed the House to reverse, vary, or alter it, "and allow *the said* exceptions."

Sir F. Kelly and *Mr. Inglis* for the Appellants.—The Court below has miscarried, by proceeding upon a charge which was contained, not in the statutory exception adjusted and signed at the trial, but in an exception of which no note was preserved at the trial, and containing matter inserted by the Judge several months' after the trial.

[*Lord Brougham.*—Why did you not object before the interlocutor was pronounced?]

We did so—the matter was argued before the Court.

[*Lord Brougham.*—Did you move to have the Bill amended?]

No, we did not.—The Court said they could not look at any other document than the one which had been presented to them by the Judge. We submit, nevertheless, that the note tendered to the Judge, and signed by him at the trial, contains the true exceptions, and those which alone can be looked at. This document was prepared in strict conformity in every respect with the provisions of the 7th sect. of 55th George III. cap. 42.

The new matter inserted afterwards may or may not have

been uttered by the Judge; we won't inquire as to that. We stand by the document prepared in conformity with the statute, and protest against the right of any Judge to put Counsel in the predicament that the truth as to what has taken place must rest on their personal asseveration. The Act of Sederunt, 16th February, 1841, is express, that the Counsel tendering an exception, is to deliver a note of it to the Judge "at the time "the exception is taken," that it is "to be certified by the Judge "at the time," and that it is "to be settled and certified as afore-"said, before the Jury is inclosed to consider their verdict." This was all done, and accordingly the document on which the Appellants rely bears the signature of the Judge, and the date of the trial, whereas that on which the Court has proceeded, is dated seven months later.

Unquestionably in practice it has been usual, for convenience sake, to postpone, until after the trial, completing the mere formal part of the Bill; but the invariable rule is not to put into the Bill any charge or exceptions not contained in the note tendered at the trial. This practice of deferring the completion of the bill has never been used, and cannot be used as authority for tampering with the note, which for all purposes is the record of the charge, and of the exceptions taken to it, and the only record of what passed, when any discrepancy occurs between it and the formal Bill.

[*Lord Brougham.*—What means had the Court of knowing of the interpolation?]

They had this document, the note tendered at the trial, which is a number of process marked by the Clerk.

[*Mr. Bethell.*—I object to the House looking at that paper, it is no part of the Bill.]

That is our complaint. The Court had no more right to look at the Bill presented to it, than at a Bill in any other cause. They were bound under the statute and the Act of Sederunt, to disregard every thing but the document duly prepared in terms

of their provisions. If it be said that some preliminary motion should have been made, there is none such in practice. No such step as amending or taking off the file has ever been known. The party is obliged to take whatever Bill the Judge chooses to give him, otherwise judgment is entered up on the verdict against him. In Pollock *v.* Morris, 7 *Dunlop*, 973, the party had omitted to tender any note of exceptions at the trial, and the Judge having framed the Bill of Exceptions according to his own notes of what took place, the party dissenting moved for leave to amend the Bill of Exceptions, but it was refused as incompetent.

Mr. Bethell and *Mr. Cockburn* for Respondents. The House is confined to the Record, as it is brought up from the Court below. It would be contrary to every principle to allow a party to allege against the Record, Buller's *Nisi Prius*, 315. The Record bears to be the Bill of Exceptions of the Appellants; it contains the passage now objected to, and in the conclusion it says that their Counsel "did request the Lord Ordinary to sign "*this* Bill of Exceptions, and thereupon the said Lord Ivory, at "the request of the said Counsel for the Defenders," *i.e.* "Appellants," did sign the said "Bill of Exceptions pursuant to "the said statute." The party cannot now be allowed to disclaim that which the Record says he had done. If he had desired to have any other Bill of Exceptions, he should have taken the proper steps for that purpose before the Record was settled.

But in truth, if he had made such an application, he would not have succeeded, for the attempt he now makes is to conceal from the Court that which is necessary to a proper conception of the exceptions. It is very true that the statute confines the Court to the exceptions signed at the trial—there is no wish to escape from this—these exceptions are embodied in the Bill now under discussion. But the statute does not require

that the whole Bill of Exceptions should be adjusted while the trial is going on; that would be impracticable in nine cases out of ten. The object of the statute, and it is so understood in practice, is that a note shall be taken and authenticated, while the trial is proceeding, of the particular matter excepted to, as incontrovertible evidence of what then took place, leaving the evidence at large, and other matter necessary to make the exceptions intelligible, to be thrown into the form of a regular Bill of Exceptions after the trial is ended, and there is more time for consideration. That was the course followed in the the Appellants to its regularity. They attended several meetings present instance, without any objection having been taken by for the purpose of adjusting the Bill. At one of these, on the 28th of November, the Lord Ordinary was requested by the Appellants to insert after "throughout its endurance," in the first exception, the words "while there is alum ore *workable in the waste*," instead of alum ore "*beneficially available* to the "tenant." His Lordship adopted this suggestion, and the Appellants themselves then completed the Bill in the form which it now bears. It is impossible then that they can now be allowed to repudiate what is in truth their own act. But, indeed, the passage objected to only expresses the meaning of the Judge in a more expanded form, and as an introduction to the exception, and without it it is not possible to apprehend what passed at the trial, or give the proper force to the exceptions. In inserting the passage, the Lord Ordinary acted in conformity with what is laid down in Cleland *v.* Paterson, 15 *Co. of Sess.*, 1246, viz., that every part of the charge should be set out in a Bill of Exceptions, so far as necessary to bring out the true import of the portion excepted against; and with what fell from Lord Eldon in Duff *v.* Fife, 2 *Wil.* and *Sh.*, 204, "I apprehend that "every part of what fell from the judge with reference to that "topic which forms the subject of the Bill of Exceptions, ought "to be stated on the Bill."

Up to the insertion of this passage the Appellants did not object to the course which was followed in endeavouring to adjust the bill to the satisfaction of both parties; and after their unsuccessful attempts to have the passage expunged, they acquiesced in what had been done, for the bill received its ultimate form from the Appellants themselves; it was by them that it was laid before the Judge for his signature; and it was by them that it was printed and boxed to the Court. Whereas if they really were disatisfied, they should have absolutely refused to take any other bill than the right one, and have brought their action against the Judge if he refused to certify it.

The exceptions having been completed, and now forming the Record, it was not possible for the Court below to meddle with them, and still less can the Court of Appeal now do so.

[*Lord Brougham.*—They ask a recal of the interlocutor and a remit, with directions to the Lord Ordinary to comply with the statute, and present a faultless bill.]

That is the same thing; the Court cannot meddle with the Record; all that the House can do is either to affirm or reverse the disallowance of the exceptions. The House is sitting substantially as a Court of Error, which cannot touch the Record. Adams on *Jury Trial*, p. 315: Lush's *Prac. B. of Excep.* 553.

Sir F. Kelly, in reply.—The conclusion in the Bill, that the Counsel for the Defenders (Appellants) requested the Judge to sign it, is untrue in fact, there was no such request.

[*Lord Brougham.*—What a position the House is placed in! to have the Record questioned before it!]

But who occasioned this?

[*Lord Brougham.*—The Judge, to be sure.]

No action as suggested by the Respondents would lie against him for refusing to sign and certify the proper Record. The Appellants therefore did all that in the circumstances they could have done, and they deny that they ever adopted the Bill now on the table. Whether what they did would amount to that,

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is of no consequence, for the statute, in order to prevent such an unseemly discussion between Counsel, has required written evidence of what passed; that is here in proper form, and all that the Appellants ask is that it may receive its due effect.

[*Lord Brougham.*—I have no doubt about the matter as to how the truth stands, but the question for the House is a mere technical one, whether you are not bound by the Record of the Bill sent up here, and the statement made in it.]

We don't aver against the Record, the note taken at the trial is the Record according to the statute, and this and every Court has power to inquire which of two documents before it is really the Record. The Judge by sealing the note at the trial was *functus officio*, so far as certifying the exceptions was concerned. He had no longer any power over them. In Holt *v.* Meadowcroft, 4 *Ma.* and *Sel.* 467, a rule had been obtained for a special jury; but no special jurors answering, the Plaintiff asked to have the cause tried by a common jury. The Defendant objected that the statute required the Court to abide by the rule for a special jury. The Judge disregarded this objection, and tried the cause by a common jury. The Court, although the Defendant joined in the trial, set aside the verdict, and ordered a new trial, and the same thing was done in Lycet *v.* Tenant, 4 *Bing, N. C.* 168.

In both of these cases it was objected that the Defendant by examining witnesses and otherwise taking part in the trial, had acquiesced in the course taken, but in both the objection was overruled, and the party was considered to have done all that was incumbent on him by stating and urging his objection.

LORD BROUGHAM.—My Lords, this case, which has now been very ably and very fully argued by the learned Counsel on both sides, presents for the consideration of this House a preliminary question of great importance, both with a view to the cause itself, and also with a view to the Scottish practice in

jury trials as far as regards Bills of Exceptions. But as no doubt can be entertained of the judgment which ought to be given upon it, I think it much better that we should at once proceed to dispose of it.

I consider that there has been very great irregularity committed in this case. I go very nearly to the full length of the learned Counsel's argument in impeaching the proceedings. I consider that the Act of Parliament has not only not in form been complied with, but that it has not, even in the substance, been complied with. I consider that it has been in two several ways, if not broken, yet disregarded, and both of those deviations from the statute are matters most material for the due and correct administration of justice.

In the first place, a trial which lasts eight days in March or April, gives rise to a Bill of Exceptions. The exceptions are tendered; they are tendered in writing as by the statute they ought to be, and at that time they are signed by the learned Judge first. There being some difficulty and doubt respecting the correctness of the writing, they are copied over again, after correcting the writing so tendered, and even then there are two inaccuracies, called verbal inaccuracies, but one of them not merely verbal. For greater certainty these are corrected, and the learned Judge who affixes his signature to the body of the instrument, also for greater correctness, to prevent all mistake, and to show that all inaccuracy in the latter part of the instrument had been corrected with his knowledge, with his consent, and before he signed the instrument, affixes his initials, "J. J." to the margin.

Well, then, this was at the very least that which ought to have been the governing instrument. Most emphatically it ought to have been the governing instrument; because it was done *de recenti*, when the whole facts were written within the knowledge of all parties, both of the learned Judge and of the Counsel on either side. This was on the 3rd, or, we will say,

on the 4th or 5th of April. Some doubts have been raised as to whether the exceptions were tendered before the Jury retired or after. That signifies not, perhaps, much. At all events, they were tendered before the verdict. That is not denied. Then what happened? On the 29th of November, eight months and more after the trial, the learned Judge signed the Bill of Exceptions. Is that according to the statute? No such thing. There is the Statute of Westminster the Second, the celebrated statute of the 13 Ed. I, in the 31st chapter of which the Bill of Exceptions is given, and it is said that there is nothing to make the sealing of the Bill of Exceptions an act that must be binding. Nevertheless the course of the profession is much to be considered. Now the course of practice of the Courts acting by force of that statute is perfectly clear. It assumes that the Bill of Exceptions must be *de recenti* and even *de recentissimo* drawn up and sealed. For here is the statement of my truly learned friend the late Mr. Tidd, the author of one of the very best books in the profession, most logically contrived and arranged, and which I must say, in justice to the memory of that most industrious and remarkable man, one of the greatest benefactors to the profession, next to *Comyn's Digest*, is the most perfect model of clear and logical arrangement, to be recommended to every student, as well as to every author in the law, and one of the few books in which you never look for what you want, without finding it. Mr. Tidd gives, with his usual accuracy, the form of Bills of Exceptions, "Whereupon (the Judge's direction being given or his refusal "being given) the said Counsel for the said C. D. did then and "there propose their aforesaid exception to the opinion of the "said Judge, and requested him to put his seal to this Bill of "Exceptions" (then and there, that is to say,) "containing the "said several matters so produced and given in evidence, "according to the form of the statute in such case made and "provided" (13 Ed. I), "and thereupon" (that is to say, at

the trial) " the said Judge, at the request of the said Counsel " for the party objecting, did put his seal, pursuant to the " statute."

Now this shows the opinion of the profession, according to which these precedents were formed and have been always used; it shows the opinion of the profession clearly to be, that a Bill of Exceptions ought to be drawn immediately, and sealed as well as drawn, *de recentissimo facto;* and manifestly this is greatly useful, because it excludes the chance of error and gives the best possible security for accuracy—the best possible guarantee against any fraud being practised by any party, or any error, for want of due recollection, being fallen into by Judges. That is the case now in our English practice, and the Scotch Act of Parliament, the Jury Act, more particularly binds down the parties by specific provisions, which are rendered still more stringent by the Act of Sederunt of the 16th of February, 1841. Now these proceedings are to be according to the statute, which requires that the same exception shall be put in writing by the Counsel for the party objecting and signed by the Judge or Judges. It does not say that it must be signed at the very time, but it clearly means that it shall be signed within a reasonable and short time after. And then the Judge who presides shall forthwith put his seal thereto; that is to say, after adding a note of the issues. It does not say of the evidence also; but no doubt the practice is, that the evidence shall be added, and also that the verdict shall be added, which shows that it is to be signed before the verdict, and notwithstanding the exception being so given in, the trial was to go on, and then the exception, with the order directing the issue and the copy of the verdict endorsed, shall be presented forthwith, that is to say, immediately afterwards, and *de recenti*. So that the Counsel shall present the exception to the Judge, and then the cause shall go on upon that exception. Can anything be more obvious than that this excludes the

supposition of an eight months' delay, with all the risks attending it? The case is voluminous, but it did not require eight days delay to prepare this Bill of Exceptions instead of eight months. What is the consequence? A Bill of Exceptions goes before the Court, which I am compelled to say I am quite convinced by matters before me is not the Bill of Exceptions which the Judge signed, and ought alone to have signed. There has been interpolated a very important part, and whether we agree with Lord Fullerton's opinion or not, at all events there is a very material addition, of which, in my opinion, the party excepting has good right to complain. It is a great irregularity, one much to be discountenanced, and which I trust will not again be found to interfere with the due execution of the anxious provisions of the Act of Sederunt; I will say, too, with the specific provisions of the statute itself.

Such is the case, and such is my opinion with respect to the unfortunate course which has been followed, owing to the delay. But unfortunately we are shut out from considering that. On this there can be no doubt whatever. The case is before us upon a Bill of Exceptions tacked to a record, and that Bill of Exceptions is not that bill which was signed by Lord Ivory, and corrected by him, which was afterwards accurately signed both in the body and the margin, to identify and authorize the correction; but it is the record of the Bill of Exceptions, which contains the interpolated passage.

It is said, "whereupon the said Counsel, learned in the law, "for the said Defendants, did then and there propose the afore-"said exceptions to the direction." That is all very well, for it might mean the last antecedent of two exceptions, according to Sir Fitzroy Kelly's contention; "and did request him to sign "this Bill of Exceptions," this identical bill—not this bill, which rests not in parchment, but in paper—but this Bill of Exceptions which has the interpolated passage, according to the form of the statute. "And thereupon the said Lord Ivory, at the

"request of the said Counsel, did sign the said Bill of Excep-"tions"—that is, this Bill of Exceptions. Therefore I am shut out; I cannot take advantage of that which I have said in my argument against this proceeding, because I am excluded as much as if I did not know of the existence of this paper, and as much as if it had been all done a day or a week after, instead of half a year after the thing is at an end; and your Lordships would be guilty of the grossest irregularity if you were to travel out of that which is before you, and to take the course suggested.

Then it is said that this might be done by an application to the Court; which was not made, however; and I do not think there is anything in that. I suppose the learned Counsel were under the instant apprehension of a verdict for 5000*l.* damages; they could not do much less than go on and take the Bill of Exceptions *talis qualis*, and argue it in the best way they could. It is ingeniously argued that the Court here had reason to suppose from the suggestion of the Counsel, fortified by affidavit, that one Bill of Exceptions was before them; whereas the other was the proper one; and that they therefore would not fail to tear the one off and put the other on. I must say that I cannot conceive any proceeding more difficult to do than this, and I do not think it possible, from any knowledge which I possess of the practice of Courts of Error, that they could have yielded to such an application. You see that the Judge is to acknowledge his seal of office. That is part of the statute, and you cannot proceed unless he does so; and it is after he acknowledges his seal that the Court of Error becomes possessed of the Bill of Exceptions. That would shut out all argument as to its not being a Bill of Exceptions. His acknowledgment of the seal would be decisive. What would happen if the Judge refused to acknowledge his seal, and said that one bill has been sealed, whereas he ought to have sealed another, I will not inquire. Suffice it to say, that this is not that case; but it is

rather the case of a Judge having acknowledged the seal. But neither the Act of Parliament explaining the old statute, nor the statute itself, says a word about the Judge acknowledging. It does not say that he shall acknowledge his signature, for an obvious reason, because the signature identifies itself, whereas the seal does not. That is the reason why the statute, in those days of greater simplicity, calls upon the Judge to authenticate the bill by his seal; but here the signature is supposed to identify itself. It is tantamount to that here, because the Judge presents the Bill of Exceptions according to the form of the statute—not at all according to the statute in point of time—not at all according to the statute in point of substance. He presents one Bill of Exceptions when he ought to have presented another. But at all events we have that which he did present, and he cannot aver against the record, which is the only thing before us, and which not only entitles us, but compels us to say (and stops us from saying the contrary) that this is the Bill of Exceptions which Lord Ivory presented, tantamount to a Judge in England acknowledging his seal; and that all is true which Lord Ivory in presenting this bill avers upon the face of it, namely, amongst other things, that this bill is sealed at the request of the party. Such being the case, I can have no doubt whatever that we are shut out from this consideration; but I wished the argument to proceed, on account of the importance of the matter in point of practice, and because it simplifies and clears the residue of the case, (to the merits of which we have not even approached as yet), namely, the illegality of those two exceptions; and I shall dispense with any argument on the part of the Counsel, on the point whether or not the part interpolated was material, because whether it be material or not, that does not affect the question. The Counsel will therefore go upon the question whether or not the two exceptions are good in point of law.

Now it is fit that these things should be considered, on

account of the alarming consequences of such irregularities. The practice is of necessity more or less slovenly as to Bills of Exceptions, because you cannot be quite certain at what time you ought to tender them. All that can be said is, that this should be done as speedily as possible after the trial. I look upon this paper, therefore, in the light in which Lord Ivory must have viewed it. I consider it not to be the Bill of Exceptions, if I were entitled to go out of the record and examine it—not the bill, but the materials for the Bill of Exceptions; and that after this draft bill was signed, it was made out more formally and signed by him in its more perfect form. But it contains a passage, the materials for which this paper did not contain—it contains a passage beyond the paper; and that passage it ought not to have contained. Over that, however, we have no power. That your Lordships will pronounce no opinion upon. We shall go into the merits of the case on Friday morning. You will quite understand, on both sides, that you need not argue the point whether Lord Fullerton was right or wrong in looking at the interpolated passage. I am inclined to think that it is material, but that is of no importance at present.

2nd June, 1850.

The preliminary objection as to the Bill of Exceptions being thus disposed of, the cause was this day heard on the merits.

The Appellant, the Earl of Glasgow, was the proprietor of lands, in which there were strata of copperas, lime, alum, and coal, lying over each other in the order in which these substances have been mentioned. The stratum of coal was five feet thick, and that of alum from three to four inches.

Previous to 1800, the coal had been worked by the method called stoop and room, *i. e.*, by cutting out the coal, leaving pillars to support the roofs of the mine, and the alum ore

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had been taken out by the Earl, and delivered by him to his tenants at the mouth of the mine; the tenant of the coal mine being distinct from the tenant of the alum ore. In the year 1800 a contract was entered into between the Earl of Glasgow of the first part, and Messrs. McIntosh and Co. (the predecessors of the Respondents) of the second part, whereby, for considerations therein mentioned, the Earl sold, assigned, and conveyed to McIntosh and Co., "their heirs or assignees, the "whole ore in the said Earl of Glasgow's coal-pits and coal-"wastes at Hurlet from which alum can be manufactured, "excepting the pyrites or copperas stones, which are already "conveyed to the partners of the Hurlet Copperas Company, "and that during the space of sixty-three years, from and after "the term of Martinmas 1799, which is hereby declared to be "the term of entry under this contract, with liberty to the said "Charles McIntosh, James Knox, John Wilson, and John "Finlay, to work and collect the said ore in all the old coal-"pits and coal-wastes at Hurlet; to open up old pits where the "same happen to be now shut; to erect gins or other machinery "for drawing the said ore to the surface; and to make roads "and passages for conveying the same from the pits to the "adjacent public roads; but reserving to the said Earl of "Glasgow, his heirs, and successors, and the tacksmen of his "coal-works, lime-works, ironstone, and other metals, the exclu-"sive use at all times of five pits, to be from time to time "condescended on or made choice of, for the purpose of working "coal, lime, ironstone, or other minerals; and declaring that, "while these five pits are thus appropriated, the said second "party shall have no right of access thereto, for collecting or "taking out alum ore therefrom: but in the event of the said "Earl of Glasgow or his foresaids proposing to work limestone "in any of the pits after the coal has been wrought out, and "from whence the alum ore has not been taken away, he and "they shall be bound, as the said Earl of Glasgow hereby binds

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" and obliges himself and his foresaids, to give the said second " party, or the person having the management of their works, " two months' previous intimation of such intention to work " limestone; or, in case of their failure to give such intimation, " that they shall shovel the ore aside at their own charges, so " as the same may not be wasted. Further, the said Earl of " Glasgow hereby agrees, that, in the event of him or his foresaids " ceasing to work the coal and limestone, and that they should " desist from drawing the water out of the waste, the water- " machinery, water-lade, and other apparatus which has been " employed for drawing the water, shall be sold and delivered " over to the said second party, at such valuation as shall be " put on the said articles by neutral persons to be mutually " chosen; and that the said second party shall afterwards have " liberty to draw the water from the coal-waste during the " remainder of this contract. And the said Earl of Glasgow " hereby binds and obliges himself and his foresaids not to fill " up any of the pits now open, or hereafter to be opened, for " working coal or lime at Hurlet, the said second party hereby " becoming bound to fence in a sufficient manner all such pits " as shall be left by the said Earl of Glasgow or his foresaids, " within two weeks after being so given up. And he likeways " grants to them and their foresaids, during the said period, the " liberty and privilege of returning the washed ore from their " alum works, and depositing the same in any of the coal-pits " at Hurlet where the limestone has been previously wrought " out. For which causes, and on the other part, the said " Charles McIntosh, James Knox, John Wilson, and John " Finlay, partners carrying on business under the firm of " McIntosh, Knox, and Company, hereby bind and oblige them- " selves, their heirs and successors, jointly and individually, " to make payment to the said Earl of Glasgow, his heirs or " assignees, or their factors for them, of a clear lordship of 1*s.* " 6*d.* sterling per ton for the whole alum ore to be taken by

"them from the foresaid pits, and that free of all charges, and "without any deduction or expense whatsoever, payable the "said lordship at the end of each half year during the con- "tract, and beginning the first term's payment as on the term "of Whitsunday 1800; and in order that the said Earl of "Glasgow may receive a just account of the whole alum ore to "be taken from the pits, the said Charles McIntosh, James "Knox, John Wilson, and John Finlay, bind and oblige them- "selves and their foresaids to keep a weighing machine on each "pit from whence the ore is taken, to cause the same be regu- "larly weighed as it is brought out of the pit, and the weights "regularly entered in account books to be kept for that purpose, "to which books the said Earl of Glasgow, or his foresaids, "shall at all times have access, and liberty to take extracts "therefrom, and he and they shall likeways have it in their "power, from time to time, to place check grieves on the pit- "heads, in order to take an account of the output of ore; and "the said second party bind and oblige themselves and their "foresaids to render to the said Earl of Glasgow, or his fore- "saids, a weekly or monthly account, if required, of the whole "alum ore which they shall work during this contract, to the "justice of which accounts the said Earl of Glasgow and his "foresaids shall be entitled to demand the oath of the manager "or servants at the work."

The mines were worked under the contract for many years, without any difficulty or difference between the parties occurring. At length, the price of alum having fallen very much in the market, and the stock of the article on the hands of the Respondents having become very large, it no longer was advantageous for them to work the alum ore as vigorously as they had hitherto done; on the contrary, as alleged by them, it was more for their benefit to leave the schistus from which the alum was obtained, and which formed the roof of the mine after the coal was taken out, to exfoliate and fall to the ground, and there

ripen for manufacture by the action of the atmosphere upon it. In the year 1835, the Appellant, Lord Glasgow, let the coal in the mines to the Appellants, Messrs. Wilson, by a lease which contained these covenants:—"1st. The whole minerals shall be "wrought in a fair and regular manner, and either by stoop and "room, or by long-wall working, or open cast quarry, as shall "appear to the said lessees, or in case of difference of opinion "between them and the proprietor, by the arbiter afternamed, "to be most advantageous for the said Earl of Glasgow and the "said lessees; but it is hereby declared, that no operation "whatever is to be carried on in the pleasure-grounds or other "enclosures at Hawkhead, and only limestone or ironstone shall "be wrought by open cast, when practicable. 2nd. It is hereby "declared that nothing herein contained shall in any way affect "or interfere with the lease of coal in Roughmussle, granted by "the said Earl of Glasgow to the proprietors of Househill, nor "in any way injure the rights of the parties who lease the alum "and copperas ores from the said Earl of Glasgow." Under this lease, Messrs. Wilson continued the working of the coal until the year 1840, when nearly the whole of it had been worked out, with the exception of the pillars which were left throughout great part of the mines.

While the workings were in this relative condition, *crushings*, as they are technically called, began to recur throughout a particular area of the mines; that is to say, the roof began to fall in and consequently to bury everything under it. In consequence, a subsidiary agreement was entered into between the Appellants and Respondents in the year 1843, whereby the Appellants Messrs. Wilson, were allowed to work out the coal of the pillars throughout the area in which symptoms of *crushing* were shown, and the Respondents agreed to take away the alum schale produced by this working, and to pay the Appellant, Lord Glasgow for it, either a fixed rent or a lordship, at his option.

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This agreement continued in operation for 3 years. Atthe end of that period the Respondents had on hand a very considerable quantity of alum ore, more than their immediate wants required, and the effect of the workings under the agreement having been to arrest the progress of the crushing throughout the remaining area of the mines, the Respondents were not disposed to continue the working of the alum unless for periods and at times which suited their own convenience and advantage. The Appellants, on the other hand, were desirous of working out the coal in the pillars of the mines, which constituted one fourth of the whole field of coal; and Lord Glasgow, assuming that the alum resting upon the top of the coal pillars did not come within his contract with the Respondents, he let it to the Appellants, Messrs. Wilson, who forthwith proceeded to work out the pillars and the superincumbent alum schale.

On becoming acquainted with these operations of the Appellants, the Respondents presented a note of suspension and interdict to the Court of Session by which they prayed that Court to interdict, "prohibit, and discharge the said Respon- "dents from collecting, removing, or carrying away any ore or "substance in the coal-pits and coal-wastes at Hurlet, or any of "them, belonging to the Respondent, the Earl of Glasgow, from "which alum can be manufactured; and also from cutting out "and removing, or weakening and injuring, any of the pillars in "any of these coal-pits and coal-wastes, whereby the said coal- "pits and coal-wastes, or any of them, may be shut up, or the "access thereto endangered or impeded during the remainder "of the lease of the alum ore held by the Suspenders, which "continues till Martinmas 1862."

The Appellants offered, during the discussion of the rights of the parties, to collect and bring to the mouth of the mine the whole alum ore either taken from the top of the coal pillars or found in the wastes, and to allow the Respondents to take it

away on payment of 1*s.* 6*d.* per ton, within six months from the time of intimation of its having been brought to the pit mouth being given to them.

Upon this offer being made judicially, the Lord Ordinary passed the note of suspension but recalled an interim interdict which he had granted, and the Court adhered to his Lordship's interlocutor.

The Respondents then brought an action against the Appellants by the summons in which they concluded to have it declared that they "have the exclusive right to the alum ore and "substances in the whole coal-pits and wastes in the said Earl "of Glasgow's lands at Hurlet, and that they have the sole "right to work, preserve, and use the same during the remaining "sixteen years of their said lease, and that none of the "Defenders have any right to take out, remove, or interfere "with any of the alum ore therein, or to appropriate the same "to their own use till after Martinmas 1862, or during the "subsistence of the said contract; but that the Pursuers have "full power and the exclusive right to take the alum ore from "the pits and wastes, and may do so at any time prior to the "expiry of their lease: And further, that until after the said "term of Martinmas 1862, the Defenders are not entitled to "close up or destroy all or any of the said pits and wastes in "which such alum ore exists, either by cutting out and removing "the coal pillars or stoops left for the support of the roof, and "necessary for that purpose, or by so diminishing them as to "render them insufficient for that purpose, but that all of the "said pillars and stoops, in so far as requisite or necessary for "that purpose, must be preserved and left during the remaining "years of said contract;" and to have the Appellants decerned to pay damages for the loss sustained by their operations.

The Appellants pleaded in defence that "1. They have no "right under that contract, or any other existing title, to such of

"the schistus or alum ore as is on the top of the coal pillars, "standing even in the old pits or coal-wastes in the lands of "Hurlet.

"2. The Pursuers are bound to collect and draw the "schistus or alum ore to which they have right in these old pits "or coal-wastes in the lands of Hurlet *tempestivè*, and before it "becomes necessary to remove the coal pillars, in order to prevent "the coal in them and superincumbent limestone from being lost.

"3. By the contract of 1800, Lord Glasgow incurred no "obligation to refrain from working the coal pillars whenever he "should think proper, or whenever such working should become "necessary.

"4. The Defenders, in virtue of the Earl of Glasgow's rights "as owner of the property, and of the rights of the other "Defenders as his tenants, are entitled to work the coal and "alum and copperas ore as they are doing."

The two actions of suspension and declarator were conjoined, and the following issues sent for trial by a jury:—

"I. Whether the Defenders, or any of them, have removed, "or are in the course of removing, or unduly diminishing "wrongfully and in violation of the rights of the Pursuers under "the said contract or lease, coal pillars in the pits or wastes "under the lands or farms comprehended in the said contract, "to the loss, injury, and damage of the Pursuers?

"II. Whether, in violation of the rights of the Pursuers "under the said contract or lease, the Defenders, or any of them, "wrongfully have collected and removed, or are in course of "collecting and removing to the surface, any alum ore or "schistus from the pits or wastes under the lands or farms "comprehended in the said contract; or have wrongfully "interfered with the Pursuers in the working, preservation, "or maturing thereof, to the loss, injury, and damage of the "Pursuers?

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"III. Whether, in violation of the rights of the Pursuers "under the said contract or lease, the Defenders or any of "them, wrongfully have appropriated, or are in the course "of appropriating, any alum ore or schistus drawn from the "pits or wastes under the lands or farms comprehended in "the said contract, to the loss, injury, and damage of the "Pursuers?"

The jury, after hearing the presiding Judge's charge as to the terms of the Respondents' contract with Lord Glasgow, returned a verdict for the Respondents and assessed the damages at 5000*l.*

The Appellants tendered exceptions to the charge in the course of the trial, which, as they were finally adjusted by the Judge and presented to the Court, were in the following terms, preceded by the passage which formed the subject of the preliminary discussion:—

"And the counsel learned in the law for the said Defenders "did, on behalf the Defenders, did then and there except to the "charge and direction, in point of law, of the said Lord "Ivory:—

"In so far as his Lordship directed the jury, in point of law, "that according to the sound legal construction of the contract, "it gives the Pursuers the right throughout its endurance to "prevent the landlord, or his tenant in the coal, from removing "the pillars in so far as necessary to support the roof, though "all the solid coal should be wrought out:

"In so far as his Lordship declined, when requested by the "Defenders, to direct the jury, in point of law, that there is "nothing in the contract of 1800, or in the leases of the coal "to the Defenders, Messrs. Wilson and Son, and their prede-"cessors, to bar the Earl of Glasgow, or any person deriving "right from him, to work out the pillar coal in a fair and regular "manner after the solid coal is exhausted."

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Both of these exceptions were disallowed by the Court, after argument, by an interlocutor which was the subject of the appeal.

Sir F. Kelly and *Mr. Inglis* for the Appellants.—The question under the issues.

[*Lord Brougham.*—The second issue is, in truth, two united. The one might be answered one way, and the other in the reverse way. This is an exceedingly loose way of pleading.]

According to English notions it would seem to be so, but no question will arise upon that, as the jury returned a general verdict. The question raised by the issues and now to be determined is, whether what the Appellants have done, and desire to continue doing, is any infringement of the Respondents' rights under the contract of 1800? That contract does not convey the wastes, but only the ore in the wastes, and the reservation to Lord Glasgow of the use of five mines shows the contemplation of the parties that the other minerals in the mines were to be worked by his Lordship. There is no covenant in the contract as to how either of the parties is to work the minerals to which they were respectively entitled, but it is obvious, from the nature of the thing, that they must each show to the other a reciprocity of fair, reasonable, equitable, and usual manner of working, otherwise it would be impossible to explicate their rights; they must exemplify the maxim, *sic utere tuo ut non alienum ledas.* If the Respondents had worked the alum contemporaneously with the coal, there could not now be any objection on their part to the Appellants' working the coal of the pillars, for that would enable them to get at the alum above the pillars, and none other would be remaining in the mines. It is only because the state of the market for alum did not make it advantageous for them to carry on the working that they discontinued it; but that circumstance cannot entitle them to interfere with the rights of the coal owner, and prevent him

mining that article according to a reasonable mode of working. The contest of the Respondents is for a right to the use of the wastes down to the last day of their contract, to the effect either of working the ore at such intervals as they may choose, or even of not working it at all, but leaving it in the mine at the termination of their contract. There is no such express covenant in the contract. It may be that unless such a right be implied, the Respondents will not draw that benefit which they contracted for, but so on the other hand, if it be implied in their favour, the Appellants will lose that right which they had before the contract, and which the contract does not expressly take away from them.

It does so happen that the coal has been worked by stoop and room, but it might equally, at the option of the Appellants, have been wrought by *long wall* or by *chair*. According to either of these methods, the whole coal would have been wrought out at once, and the alum must have been removed at the same time or else have been lost altogether, for no support of coal having been left for the roof of the mine, it would have fallen in, and so buried the alum. The circumstance that the owner of the coal has chosen one mode of working rather than another, and a mode which did not render the immediate working of the alum necessary, cannot change the right of the two parties, and give the owner of the alum a larger liberty than he otherwise would have had. If the tenant of coal might at first have worked by long wall, and so have left no pillars of coal, there is nothing in the Appellant's contract which compels him not to touch these pillars which are there only because he chose to leave them.

[*Lord Brougham.*—May not the alum tenant refrain from working at all?]

If so, as the only return on the alum is a lordship, there would be no revenue from it. The meaning of the contract was, that both coal and alum should be wrought fairly.

[*Lord Brougham.*—Is there any, and what obligation on the alum tenant to work?]

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None, perhaps, in the ordinary case, but this is a peculiar one, there being several minerals in the same mine, each leased to different parties. The one cannot be entitled to lie bye, and so defeat the rights of the others. They must both conform to a reasonable arrangement, by which all may be fairly wrought. And that this is the spirit and intention of the contract with the Respondents, is shown by the covenant that they should receive two months' notice before the Appellant should work the limestone lying above the alum. But the charge to the jury makes no account of the rights of the Appellants; it excludes them entirely from the view of the jury, and rests the decision of the case entirely upon the interests of the Respondents. Instead of giving an opinion upon the terms of the contract having reference to the circumstances of the case, and leaving the jury to say what were the rights of the parties, it decides the meaning of the contract, and leaves nothing for the jury but the amount of damages.

Mr. Bethell and *Mr. Cockburn* for Respondents.

The Respondents and the Appellants, Messrs. Wilson, were not, as the argument of the Appellants assumes, tenants in common, bound to respect each other's rights. At the date of the contract, 1800, the Appellant, Lord Glasgow's, right to the whole mines was unaffected by any lease of the coals. What he did not then grant, remained in him, and what he did grant bound that which remained in him; accordingly, in giving the Appellants, Wilson and Son, their lease of the coal, an express covenant was taken from them that nothing in it should injure the rights of the lessees of the alum ore. Although this was expressed in the lease to Wilson and Son, it was no more than what the law would have implied against them in favour of the Respondents. The lease to the Respondents does not impose upon them the necessity of working the alum in any particular manner. They are entitled, therefore, to do so in the way most

profitable to them. That way they had found was by allowing the ore to fall of itself from the roof, and by the action of the atmosphere to exfoliate upon the floor of the mine, and so ripen spontaneously for the purpose of manufacture. It was, therefore, a great object with the Respondents that the passages of the mines or wastes should be kept open, and not filled up, as they would be by the destruction of the pillars. Accordingly, their contract throughout contemplates this reservation of right to work the limestone, which contains a covenant that on failure to give intimation of the intention to work it, the landlord "should "shovel the ore aside, so as the same may not be wasted," shows this most obviously; for if the mines were not to be continued open, the limestone could neither be wrought, nor the alum ore be shovelled aside; and it is shown more clearly still by the privilege reserved to the Respondents of depositing the washed ore in any of the pits.

There is nothing in the Respondents' lease which binds them, as to the landlord, to any particular mode of working; and so far as regards the lessees, Messrs. Wilson, their lease ties them down to working so as not to interfere with the lease to the Respondents, or to injure their rights. So far, therefore, from the alum lessees being bound to work with consideration for the interests of the coal lessee from any rule of equity, the express law of the contract is just the reverse, viz., that the coal lessee must work so as not to injure the alum lessee, and the charge of the Judge was in accordance with this view.

LORD BROUGHAM.—My Lords, this case which was very fully and ably argued, turns upon two points. We disposed of the first, respecting the additions which were made to the Bill of Exceptions very irregularly, and in a manner much to be disapproved of, and which I hope will not occur in future. We disposed of that point on the first occasion of the case coming before your Lordships; and before the second argu-

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ment, which was upon the merits of the case, was heard. The question now more immediately under consideration is as to the two exceptions which have been taken, and both of which turn upon the construction that is to be put upon the contract, and the leases of the coal to the Defenders.

The first exception is, "In so far as his Lordship directed "the Jury, in point of law, that, according to the sound legal "construction of the contract, it gives the Pursuers the right, "throughout its endurance, to prevent the landlord, or his "tenant in the coal, from removing the pillars in so far as "necessary to support the roof, though the solid coal should "be wrought out."

The second exception is, "In so far as his Lordship "declined, when requested by the Defenders to direct the "Jury, in point of law, that there is nothing in the contract "of 1800, or in the leases of the coal to the Defenders, "Messieurs Wilson and Son, and their predecessors, to bar "the Earl of Glasgow, or any person deriving right from him, "to work out the pillar coal in a fair and regular manner, after "the solid coal is exhausted."

My Lords, I have come, upon a full consideration of this case, to the conclusion at which the Courtbelow arrived, agreeing with the learned Judge who tried the cause—Lord Ivory—in the construction which he put upon the contract. And I think that the reasons given by Lord Mackenzie with his usual clearness, put the whole question in a very strong and commanding point of view. "The pillars are never "mentioned in the contract," (he justly observed) but "a "right to work out these not being reserved while other "rights were reserved, is very important." It is most important when you consider that the support of the alum by these pillars was absolutely essential to the right conveyed to work the alum mines. That must never be left out of view

where the question relates to two strata, the one superincumbent upon the other.

It is further to be considered that there is a provision that the Alum Company shall have the "liberty and privilege of "returning the washed ore from the alum works, and depo- "siting the same in any of the coal-pits at Hurlet, where "the limestone has been previously wrought out." There is a manifest intendment here, and in the subsequent part of the lease, that there were to be wastes—that wastes were in contemplation as under the works, and that those wastes were to be kept existing as open and vacant spaces under the "roof of which" wastes "containing alum schistus," were "to be supported by coal pillars."

Upon the second exception, I agree with Lord Mackenzie, who justly observes that here "the matter is still clearer," and I must state that the concluding passage in the explanation of the construction given to the contract, by the learned Judge, is most material. The whole statement of the law, he says, is laid down by Lord Ivory, and is really explained by the concluding words, that "all the solid coal should be wrought." I am of opinion, having no doubt upon the subject, that the true construction was put before the Jury in the direction of the learned Judge, and that this construction, the objection to which was the ground of the second exception, has been rightly adopted by the Court below. I am, therefore, of opinion against both exceptions, and that the decree against the Bill was right.

It is wholly unnecessary to enter at greater length into the reasons and grounds upon which I have come to this conclusion, which are the same with those upon which the learned Judges in the Court below decided. I only thought it right to occupy your Lordship's attention for these few minutes, in order to note that on the two points raised, and especially as to the

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first and most material exception, the reasons so forcibly put by Lord Mackenzie are quite sufficient to support the judgment of the Court below.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON—RICHARDSON, CONNELL, and LOCH.

[HEARD *2nd*—JUDGMENT *5th July*, 1850.]

THE RIGHT HON. JOHN STUART WORTLEY MCKENZIE LORD WHARNCLIFFE, *Appellant.*

DAVID NAIRNE, ESQ., of Drumkilbo, *Respondent.*

Taillie.—Particular structure of the irritant clause of an entail, as to which the expressions "such debts, facts, and deeds," done in the contrary of the premises, were held to apply to sale, which was an act effectually struck at by the prohibitory clause; but, as to which, the irritancy thus effectual, if the clause had stopped there, was held to be rendered ineffectual by these words which followed: "in so far as the same might infer any actions, personal or real, "against the next heir of taillie, or the land and others foresaid."

Ibid.—An Entail to be effectual must contain, not a partial or qualified, but an absolute declaration of nullity of the Acts prohibited.—*Semble.*

THE question raised by this appeal was the right of the Respondent, the heir of entail in possession of the lands of Drumkilbo, to sell these lands, notwithstanding the fetters of the entail. This question was raised in the Court below by suspension, at the instance of the Appellant against the Respondent, as of a threatened charge for payment of 38,000*l.*, the price of the lands, upon a sale which had taken place between them, and by an action of declarator by the Respondent, directed against the Appellant and the substitute heirs of entail, to have it declared generally "that the Pursuer has full and undoubted right and power to "sell and alienate the several lands and others contained in the "foresaid disposition and deed of entail, in any way he may "think proper, for a price or other onerous consideration, and "to grant and execute all dispositions, conveyances, deeds, and "writings whatsoever, which may be requisite or necessary for "effectually conveying the whole, or any part or parts of the

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" said lands and others which may be so sold and alienated; " and that, upon selling and alienating the whole, or any part " or parts of the said several lands and others, the Pursuer has " the sole and exclusive right to the price or prices, or other " consideration; that the same are the Pursuer's absolute pro- " perty; and that the Pursuer does not lie under any obligation " to invest, employ, or lay out the same, or any part thereof " in the purchase, or on the security, of any other lands or estate " or otherwise, for the benefit of the Defenders, or either of " them; and that they have no right or title to interfere with " or control the Pursuer in the use or disposal of the said price " or prices, or other consideration, in any manner of way; and " also that the Defenders, or either of them, have no claim or " demand of any description against the Pursuer, or against his " heirs or representatives, in the event of his death, for or in " respect of the sales or alienations which may be made, or dis- " positions or other writings which may be granted or executed " by the Pursuer, or for or in respect of the Pursuer using or " disposing at his pleasure of the said price or prices, or other " consideration;" and more particularly that the sale to the Appellant was valid and effectual.

The deed of entail under which this question arose, was a disposition and entail which had been executed in 1705 by John Lord Balmerino, in favour of Alexander Nairne and others, and which contained the following prohibitory, irritant, and resolutive clauses :—" And sicklike providing, likeas it is hereby " specially provided and declared, that it shall not be lawfull to " the said Alexander Nairne or the other heirs of taillie above " mentioned, who shall succeed to the said lands and others " above mentioned, by virtue of this present right, to sell, " anallie, dispone, dilapidate, nor put away, the lands, teinds, " and others, above exprest, or any part thereof, either heritably " and irredeemably, or under reversion, nor to grant infeftments " of annualrent, or yearly duties furth thereof, nor to contract

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" debts or sums of monie, wherewith the samen may be bur-
" thened, exceeding a yearly free rent of the said lands and
" estate, or to do any other fact and deed whereby the said lands
" and others foresaid may be apprised or adjudged from them,
" or anyways burthened in prejudice of the subsequent heirs of
" taillie, or their foresaids, or shall suffer any apprising or
" adjudication to be led of the said lands to run for the space of
" five years, without redemption thereof; nor shall it be leisom
" nor lawful to them to break, alter, or infringe this present
" right or taillie, in the course of succession above-mentioned:
" And if he, or any of the forenamed persons, heirs of taillie,
" shall contraveen and do in the contrary, *or* (*sic. in orig.*)
" any point of the premises, then not only all such debts, facts,
" and deeds, are, *per verba de præsenti*, declared to be *ipso facto*
" void and null without declarators, in so far as the samen might
" infer any actions, personal or real, against the next heir of
" taillie, or the lands and others foresaid: But also the persons
" substitutes, or heirs of taillie foresaid, contraveening, or who
" shall contraveen, any of the conditions and provisions above
" mentioned, and the heirs-male of their bodys, shall forefault,
" amit, and tyne, their right of succession to the lands and
" others above mentioned, and all rights or infeftments in
" their persons shall immediately thereafter expire and become
" extinct, void and null."

In December, 1705, a Crown Charter was *expede* in favour of the first disponee in the entail upon the procuratory contained in it. Infeftment was taken upon this charter, and duly recorded. Titles were made up in the persons of several successive heirs until the succession opened to the Respondent, who likewise made up his title by a charter bearing express reference to the original entail.

The process of suspension and action of declarator having been conjoined, the Lord Ordinary (Cuninghame) did not himself pronounce any interlocutor, but ordered the parties

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to prepare and box cases, and with these he made great avizandum to the Court. The Court (1st division) directed the cases to be laid before the Judges of the other division and the Lord Ordinary. These Judges, including Lord Cuninghame, but excepting Lord Ivory, who declined to take any part, were unanimously of opinion that the entail was invalid, and thereafter, the Lords of the first division, with the exception of the Lord President, concurring in that opinion, they, on the 20th of July, 1849, pronounced the following interlocutor, which was the subject of the appeal:—"Find, that the entail of Drumkilbo "is defective in the irritant clause, and is, consequently, not "sufficient to prevent a sale of the estate: therefore in the "suspension, repel the reasons of suspension, and find the letters "orderly proceeded, and in the declarator, repel the defences "and decern against the Defender in terms of the conclusions of "the libel and decern."

Along with the interlocutor, making great avizandum to the Court, the Lord Ordinary issued the following note, which contains such a neat summary of the cases bearing upon the present, as to make it unnecessary to go further into the subject in this report:—"It is objected to the entail in question (of "Drumkilbo, in Forfarshire), that it is exceptionable in the "*irritant* clause, which is quoted at length in the narrative of "both revised cases. Two objections are stated and enlarged "on relative to that clause.

"1. It is argued that the 'debts, facts, and deeds,' *irritated* "by this entail, must have the limited construction adopted in "the cases of Blair-Adam (1 *Shaw, Appeal Cases*, p. 24); and "of Lang (1 *Dunlop*, p. 98, and *M'Lean and Robinson*, p. 871); "and of Ulbster (26th February, 1841)—in all of which pre-"cedents, irritancies of 'facts and deeds,' or of 'debts and "'deeds,' were held to apply only to a limited class of facts "and deeds, specified in the immediately preceding conclusion "of the prohibitory clause, and not to sales set forth in an

" earlier part of it: and that the present question is distin-
" guished from the cases of Finzean (2 *Dunlop*, 1162), Knight
" (5 *Dunlop*, 221), and of Leith Hay (5 *Dunlop*, 347), in which
" a general declaration, that 'all debts, deeds, or acts, done in
" ' contravention of the premises, shall be null,' was held to
" apply to the whole branches of prohibition, including sales,
" and all other alienations.

" Some of these cases may appear to turn on narrow and
" nice distinctions; and, in general, the validity of every entail
" must depend on a critical examination of its own terms. The
" irritancy in the present instance is thus expressed:—' And if
" ' he or any of the forenamed persons, heirs of taillie, shall
" ' contraveen, or do on the contrary, *in any point of the pre-*
" ' *mises*, then not only all such debts, facts, and deeds, are,
" ' *per verba de præsenti*, declared to be *ipso facto* void and
" ' null without declarators, *in so far* as the samen might *infer*
" ' any *actions*, personal or real, against the next heir of tailzie,
" ' or the lands and others foresaid.'

" When that clause is contrasted with those in the cases of
" Adam, affirmed in the House of Lords, and of Knight and
" Leith Hay before referred to, which deserve to be attentively
" re-perused, and, perhaps, placed in *juxtaposition* with the
" present in an Appendix, the Lord Ordinary leaves it to the
" Court to determine whether the irritancy here can admit of a
" construction less stringent than those sustained in the last
" instances cited.

" 2. The other exception taken to the irritant clause is, that
" it is of a *limited* and *qualified* nature, and does not validly
" render null all acts and deeds *absolutely*, but only 'in so far
" ' as the same may *infer* any *actions*, personal or real, against
" ' the next heir of tailzie.' Such a clause, it is argued, does
" not apply to a sale upon a conveyance with procuratory and
" precept, which requires no action, *personal* or *real*, to make it
" effectual.

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"The terms of the irritant clause thus noticed are certainly "peculiar, and do not appear *in ipsissimis verbis* in any other "case the Lord Ordinary has been able to find. At the same "time, in later times, certain cases have been tried, on clauses "of nearly similar import, which deserve to be kept in view in "the present question, in order to preserve uniformity of "decision in the construction of deeds of this class. In par- "ticular, in the case of Munro of Foulis, in 1826, (4 *Shaw*, "467), it was found, both by this Court and the House of Lords, "that 'a declaration that debts and deeds shall be null and "'void, *so far as they affect the estate*, is sufficient, without "'declaring that they shall be null and void as against the "'contraveener.' See also the cases of Mackenzie and of "Nisbet, in 1823 (2 *Shaw*, pp. 331 and 381), as well as the "Dryburgh entail, quoted in the papers.

"The Court will judge how far the objection is ruled by these "cases, or is maintainable on any other ground."

Mr. Wortley and *Mr. Anderson* for the Appellant.

Mr. Bethell and *Mr. Handyside* for the Respondent.

LORD BROUGHAM.—My Lords, this case, which is of considerable importance in respect of the value of the property, and the amount of the purchase money (38,000*l.*), is also of some, though, all things considered, not perhaps of very great, importance, with respect to the points of law made, was fully heard before your Lordships; and able arguments were offered by the learned Counsel for both the parties.

It appears that two points were made in the Court below, upon which there was some difference of opinion among the learned Judges. Both these points refer to the sufficiency of the irritancy to guard the prohibition against selling, it being admitted on all hands that the prohibitory clause "to sell,

"anallie, dispone, dilapidate, nor put away the lands, &c," is perfectly sufficient to prevent sale. The prohibition goes on: "or to do any other fact and deed whereby the said lands and "others foresaid may be apprised or adjudged from them, or "anyways burthened, in prejudice of the subsequent heirs of "tailzie, or their foresaids, or shall suffer any apprising or "adjudication to be led of the said lands to run for the space of "five years, without redemption thereof; nor shall it be lawful "to them to break, alter, or infringe the present right or taillie "in the course of succession." Next comes the irritant clause, upon which the two points were raised: "And if he or any of "the forenamed persons, heirs of taillie, shall contraveen and do "in the contrary, or any point of the premises," then "all such "debts, facts, and deeds shall be null and void" (on which words one point is raised) "in so far as the same might infer actions "personal or real against the next heir or the lands" (on which words the second point is raised). There is, lastly, a resolution or forfeiture, and a devolution in consequence, on which nothing turns.

1. These words, "shall contraveen and do in the contrary, "or" (which is manifestly a clerical error: it should be "*in*") "in any point of the premises," would be quite sufficient, if there followed no restrictions or limitation of the generality. For it was not necessary (as no Scotch lawyer need be reminded) that there should be any particular form of irritancy adopted. If you have prohibited sale and alienation, contracting debts, encumbering, or altering the order of succession, you may, without naming any of those particulars, provided you do not restrain the generality, irritate, and resolve, by a reference to the preceding prohibitions, and this would be as effectual to prevent sale, contracting of debts, and altering the order of succession, as if those very words had been repeated in the irritant and resolutive clauses.

Now here the words "are or shall contraveen and do in the

"contrary in any point of the premises" (which includes sale undeniably); and had it stopped there, and the declaration of nullity only been added, this would have been sufficient. But the question is, and the first question, whether that is not limited and restrained by what follows? "Then all *such debts*, "*facts, and deeds, &c.*" That is to say, such things as are contracted and done by the contravener shall be irritated. Now I am inclined to think, and the learned Judges below give us reason to believe that they too thought (my Lord Moncrieff does not give a positive opinion upon this; but the others for the most part appear to hold, I think rightly, that), taking the whole together, "all *such* debts, facts, and deeds" being declared to be void as against the contravener who shall act "in the con- "trary in any point of the premises," we are thus referred back to the prohibition, and we find it include among other things all sales in express words; and therefore sales would be declared void, unless something followed to restrain or limit the denunciation of nullity. The second question is, whether or not some restriction does follow; and this is the material point.

2. If the instrument had stopped at the words, "are declared "to be null," I think that would be sufficient to declare a nullity absolutely. But it goes on: "are declared to be null in so far "as the same might infer any actions personal or real against "the next heir of taillie, or the lands and others foresaid." Then comes the resolution which depends upon the irritancy.

Now I am of opinion that this addition restrains the preceding generality—restrains the words declaring nullity of sale. The words "*in so far as*" impose on the clause a restriction or limitation: they confine the declaration of nullity to such debts, deeds, and facts as may infer actions against the heir or lands, and prevent the declaration from being an effectual fettering clause to prevent sale. For, first, I incline to agree with those who hold that the Entail Act requires an absolute declaration of nullity, and is not satisfied by a partial or qualified declaration.

But, secondly, there can be no doubt that the irritancy in question only strikes at such sales as infer an action; whereas a sale may be so effected as to be complete, and enable the purchaser to perfect his title without any suit whatever. Therefore I must hold that the irritancy is ineffectual.

The learned Judges differed in opinion upon the second point—that which is most material. Possibly there was some difference upon the first; certainly there was upon the second. A most respectable and most respected authority, the Lord President—followed at one stage of the cause by another to whose opinion we all have the greatest deference, my Lord Jeffrey—considered that there was sufficient in the fettering or fencing clauses to tie up the heir of tailzie, and to prevent sale, the other Judges holding a different opinion.

Now, upon what chiefly do the opinions of the minority rest; and especially that of the Lord President, who all along held the entail valid, and with whom Lord Jeffrey, after hesitation, ultimately agreed? The main grounds of that opinion were the case of *Jordanstone*, and the case of *Raimes*, which is auxiliary to it. There is a very judicious course taken on page 17 of the Appellant's case; and I wish it were followed more frequently when there is a reference from the case at bar to former cases, for the purpose of comparing different instruments together. I mean the printing them in opposite columns, and in close juxtaposition with each other; so that the eye may at once fix itself upon the minute particulars of the clauses, passing at once from the case at bar to the cases with which it is sought to be likened on the one hand, or contrasted on the other. The *Jordanstone case* and the *Raimes case* are printed in this manner; and it is pretty clear to me (as I threw out during the argument) that this is fatal to the contention which would raise a similarity between the present case and those two. For the Jordanstone case is: "And if the said George Cockburn, Knight, or one or "other of the said heirs of tailzie, shall contravene or do in

" the contrary, in any part of the premises, then not only *shall* " *all such deeds and debts be void and null of themselves*" (not in so far as they may infer an action, but only) " and no ways " binding or obligatory to infer any action or execution personal " or real against the next heirs of tailzie, or the lands and " others foresaid, &c." It does not say, that in case he shall contravene, " then all such debts and deeds shall be null and " void in so far as they infer any action or execution." That would have been like the present case. But it is no such thing. It is: " that such debts and deeds shall be *null and void of them-* " *selves*, and noways binding or obligatory to infer any action"— a totally different clause. The words added may even seem to enlarge—certainly they do not restrict the preceding portion of the denouncement.

Then the Raimes case is: " all which debts, facts, and deeds " are by these presents declared *to be void and null, ipso facto*, " without declarator, as far as concerns or as the same may " burden or *affect my said taillied estate*"—not " in so far as it " goes to infer an action," but " as it affects my taillied estate." Nothing can be more different than the case at bar and that case. These two cases, therefore, are inapplicable to the present; and the same may be said of the others that were cited, Murray *v.* Murray, and the Dryburgh case or the case of Erskine. Those also fall within the description, not so much of the *Jordanstone case*, as of the *Raimes case*, because the nullity is in those cases declared of all facts and deeds which affect the land. The case of Knight is equally distinguishable; for there the deeds are declared to be " null and void of themselves."

My Lord Moncrieff's opinion was very decided and unhesitating; nor can any opinion be received which is more entitled to our respectful consideration. His Lordship did not deem it necessary to enter into the argument at this late period of our judicial history, and when the law of entail has been so often and so fully considered. I am therefore sanctioned by his high

authority in expressing my opinion without hesitation, and in respectfully declining to share the doubts of some of the other Judges. The clause is so framed, that whatever might have been the intention of its maker, it does not reach one class of sales; and to that class of sales belongs the very sale in question.

My Lords, I threw out, in the course of the argument, that I do not go along with a most learned and able Judge, Lord Fullerton, in regarding this as peculiarly a case of critical nicety—a case of verbal criticism. Every case of this sort must be a case of verbal criticism. The question is always whether the words import the thing which it is alleged on the one hand, and denied on the other, that they are intended to import. I have no hesitation in advising your Lordships to affirm the interlocutor appealed from.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed.

RICHARDSON, CONNELL and LOCH.

[HEARD 26*th February*—JUDGMENT 14*th August*, 1850.]

DAVID SCOTT, Esq., of Brotherton, with consent of H. SCOTT, and others, *Appellants.*

JAMES R. SCOTT, Esq., and others, *Respondents.*

Legacy.—Vesting.—When a gift is to a class of persons or an individual, to be ascertained at a future period, those who may answer the description at an earlier period, cannot, by arrangement among themselves, anticipate the period fixed, and exclude those who, on its arrival, would then be entitled to take.

UPON the 20th day of November, 1834, James Scott executed a trust disposition and settlement of his whole heritable and moveable means and estate, excluding his lands of Brotherton, for payment of his debts and of such legacies and annuities as he might give, by any addition to that deed, or by any separate deed, to be afterwards executed by him, declaring that if the estate conveyed were not sufficient for these purposes, the surplus of the debts and legacies should be a real burden upon his lands of Brotherton. Of equal date with the foregoing deed, Scott executed a disposition and settlement of his lands of Brotherton in favour of his brother David Scott, the Appellant, in liferent, and James Robert Scott, his nephew, the Respondent, and the heirs of his body and other substitutes in fee, under burden of such of his debts and legacies as might not be provided for and paid by the means and estate conveyed by the first mentioned deed, declaring, "that in case Mrs. "Anna Maria Tulloh or Scott, mother of the said James Robert "Scott, shall be alive at the time of the death of the said David "Scott, my brother, and be then a widow, and her said son

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" shall be then alive, and shall be in right of the fee of the said " estate, then, and in that event, I hereby burden the said lands " and others, and the said James Robert Scott, and the other " heirs above mentioned, in payment to the said Mrs. Anna " Maria Tulloh or Scott of a free yearly annuity of 100*l.* ster- " ling, payable at two terms in the year, Whitsunday and " Martinmas, by equal portions, the first half year's annuity to " become payable at the first term of Whitsunday or Martin- " mas, which shall happen three months after the death of the " said David Scott, my brother; and thereafter the said annuity " to continue to be payable out of the said lands and others " during the life of the said Mrs. Anna Maria Tulloh or Scott, " or so long as she remains a widow."

On the 22nd day of September, 1835, Scott executed a deed of appointment, whereby he directed his trustees to pay, *inter alia*, " To my brother David's family, subject to his dis- " tribution among them, 13,500*l.* sterling; and failing of his " making any other division, to be divided as under:—To " Hercules Scott, his only son, 3000*l.*; and to each of his " seven daughters the sum of 1500*l.*" The deed declared:— " The above legacies to be payable as under, viz., those be- " queathed to my brother David's family, subject to his distri- " bution, as above mentioned, to bear interest from the first " term of Whitsunday or Martinmas after my death; but in " the event of the said David Scott, my brother, surviving me, " and succeeding to the liferent of my estate of Brotherton, the " interest of these legacies is not to be due or payable by my " trustees or executors, but by the said David Scott, during his " life, at the rate of four per cent. per annum; and the term " of payment of the principal sum is to be postponed till the " first term of Whitsunday or Martinmas after the said David " Scott's death, or as soon thereafter as conveniently may be, " without rendering it necessary for the heir succeeding to " Brotherton to sell or dispose of any part of the same, but to

" bear interest from the said David Scott's death, at four per " cent. per annum, till paid;" And " whereas there is at pre- " sent due to me (the testator) by the said David Scott a sum " of money, amounting to 11,439*l.* 17*s.* 2*d.*, for which he " granted me his note, dated the 1st day of July, 1826, payable " on demand, besides a considerable balance of interest due " thereon, I hereby require and appoint this debt, or such part " of it as shall be due and resting owing at the time of my " death, shall be applied in payment of the legacies bequeathed " by me to the said David Scott's family, in manner before " mentioned. All the other legacies hereby bequeathed shall " become due and bear interest at four per cent. per annum, at " and from the term of Whitsunday or Martinmas first after " my death: And in case of any residue being left in the " hands of my said trustees, after the purposes of the trust " shall be fulfilled, I hereby appoint the same to be made over " and paid to my nearest relations then alive. And as it was " the declared intention of my deceased sister, Helen Scott, to " have left to the family of the said David Scott, my brother, " the house and garden at Morningside, near Edinburgh, which " belonged to her; but as no valid conveyance was executed by " her thereto, the title to the said house and garden was com- " pleted in the person of my deceased brother, Archibald Scott, " as heir-at-law of my said sister, with the view of thereafter con- " veying the property for behoof of the children of my said " brother, David Scott, agreeably to my sister's intentions; but " these intentions not having been carried into effect during the " said Archibald Scott's lifetime, the right to the said house " and garden has now devolved upon my nephew, James " Robert Scott, as heir-at-law to his said father; therefore, I " hereby recommend to the said James Robert Scott, my " nephew, and his guardians, upon a title to the said house and " garden being completed in his person, to fulfil the intentions " above referred to, by conveying to the children of the said

"David Scott, equally amongst them, the foresaid house and "garden at Morningside, with the rents thereof falling due and "received subsequent to the death of the said Archibald Scott, "his father, in so far as they may not have been placed to the "said David Scott's credit by me; and in the event of this "recommendation not being acted upon, and of the said house "and garden at Morningside not being conveyed to the family "of the said David Scott, my brother, then, and in that event, "I leave and bequeath to the family of the said David Scott "an additional provision of 700*l.* sterling, equally amongst "them, bearing interest from the time that the rents of these "subjects shall have ceased to have been applied for behoof of "the said David Scott or his family, in lieu of the said house "and garden: And which additional provision I hereby "declare to be a real burden upon my said lands and estate of "Brotherton, in terms of the provisions and conditions con-"tained in the disposition and settlement of that estate executed "by me."

The trustees accepted of and acted under the trust until the month of April, 1845, when they brought an action of multiplepoinding and exoneration against the several parties entitled under the deeds which have been detailed.

The Appellant lodged a claim in this action, wherein he averred that the whole debts and general pecuniary legacies of the testator had been paid; that the legacy to his own family had been secured for their benefit, and they had given the trustees a formal discharge of it; that the personal estate had been more than sufficient for payment of the debts and legacies; and that there was a considerable surplus of both real and personal estate in the hands of the trustees. This surplus the Appellant claimed as the sole nearest relative alive at the time of the testator's death.

The Respondent also lodged a claim in the multiplepoinding, in which he did not deny the facts alleged by the Appellant, but

claimed to be entitled to the surplus real property in the hands of the trustees; and in the event of his being alive at the death of the Appellant, an equal share of the surplus moveable property along with the other nearest relations of the testator who might be alive at that time, or at least in that event an equal share with the nearest relations then alive, of all the surplus real as well as personal property.

Mrs. A. M. Tulloh or Scott likewise lodged a claim in the multiplepoinding, asking that an adequate portion of the trust funds might be set apart to secure payment of her annuity of 100*l.*, in the event of its becoming payable.

The Appellant, in support of his claim, pleaded:—

"1. The claimant being the sole nearest relative of the "truster alive at the time of his death, and the purposes of the "trust being fulfilled, according to the sound meaning and legal "construction of the trust-deed and other testamentary writings "of the truster, the claimant is now entitled to the whole residue "of the trust-estate, in terms of his claim.

"2. The said competing claimant has no legal right or "interest under any of the truster's testamentary deeds to resist "a present winding-up of the trust and surrender of the residue "of the trust-estate to the claimant, in terms of his claim. And "Mr. James Robert Scott's plea on this head is contrary to the "sound construction and legal meaning of the truster's deeds."

The Respondent, on the other hand, pleaded:—

"1. The truster having directed that the interest of the "bequest left to David Scott's family should be paid by David "Scott during his life, if he should survive the truster, and "succeed to the liferent of the estate of Brotherton; and having "farther expressly postponed the payment of the bequest till "David Scott's death, he clearly contemplated a continuance of "the trust till then, and the trustees are not entitled to termi-"nate the trust and make over the residue before that event,

" whereby the rights and interests of the claimant and others " would be inverted and frustrated.

" 2. In the event of the claimant being alive at the death " of David Scott, and the whole purposes of the trust being " then fulfilled, the claimant is entitled to an equal share of the " residue which may then remain in the trustees' hands, along " with the other nearest relations of the truster who may also be " alive at that time."

The cause was reported by the Lord Ordinary to the Court upon cases for the parties. Upon advising these papers, and hearing Counsel, the Court, on the 18th June, 1847, pronounced the following interlocutor, which was the subject of the appeal: " Find that, according to the sound construction and true " meaning of the trust-deed, and other testamentary writings of " the truster, the claimant David Scott, is not, in the circum- " stances set forth in the record, entitled to the residue in the " hands of the raisers, forming the fund *in medio:* Therefore " repel the claim of the said David Scott; find that the residue " does not fall to be paid over till the death of the said David " Scott, and must then be paid over to the parties who at that " time shall be the nearest relations in life of the testator."

The *Lord Advocate,* and *Mr. Turner,* and *Mr. Rolt,* for the Appellant, cited the case of Maxwell *v.* Wylie, 15 *S.* 1011, to show that the circumstance of his being a liferenter did not raise any presumption against the Appellant being entitled under the deeds to a share of the residuary estate; and the cases of McNiven's trustees *v.* McNiven, 19 *Scot. Jur.,* 529; Robertson *v.* Davidson, 9 *S.* and *D.,* 152; Fotheringham, *Mor.* 12,991; Magendie *v.* Carruthers, 2 *Bell's Illus.,* 516, to show that the trustees were not bound to keep up the trust until the death of the Appellant.

Mr. Bethell, Mr. Anderson, and *Mr. Elliott,* for the Respondent.

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Lord Brougham.—My Lords, in this case, the whole controversy between the parties turns upon the construction to be put on the trust-deed of Mr. Scott, of Brotherton. The estate of Brotherton was conveyed in liferent to his brother David; and a legacy was given to David's children. The residuary interest, which is somewhat material, I shall have occasion to refer to, as throwing light upon the construction to be put upon the deed,—but I pass that over for the present.—The principal of the legacy was made payable at the brother's death, afterwards the testator executed a trust-deed whereby he conveyed to his trustees all his property, except the estate in liferent to his brother David previously disposed of. By this trust-deed he directed certain legacies to be paid and he appointed the residue in these words, which are material. "After the purposes of the trust shall be fulfilled, the residue "to be paid to my nearest relations then alive."—The brother was the nearest relation alive at the time of his death; the trustees having already fulfilled all the purposes of the trust except the payment of the principal and the legacy to the brother's children. A family arrangement was however then made by which the children discharged the trustees in respect of their claim for that legacy, and the brother David then claimed the residue as being the nearest relation alive, contending that the word "then" applied to that time—that the event had arisen to which the word "then" in the deed applied.—The question, therefore, for your Lordships to consider is, what is the true construction to be put upon this clause in the deed?

Upon examination of this deed it appears to me, and to my noble and learned friend who heard the case with me—the late Lord Chancellor, (who agrees entirely in the opinion that I am now about to give to your Lordships,) that it is not a case upon which the Court is at liberty to speculate upon the intention of the maker of it; to argue or to conjecture upon the probability

of his having intended one thing or another from the other parts of the instrument. Such reasoning, and such inference, ought never to have place where the terms are distinct and positive, and incapable, *per se*, of more than one construction, unless indeed some known rule of law intervenes. To the other parts of the deed you have no right, as a general principle of construction, to resort, in order to discover the intention of one part of the deed, when you perceive that the terms in which that one part is couched are clear, positive, and distinct, and of themselves incapable of more than one construction.

The subject of the gift here is the residue "after the "purposes of the trust shall be fulfilled" of which David Scott, the brother, was one of the trustees, and the direction is, that such residue left in the hands of the trustees shall be made over and paid to his (testator's) "nearest relations then alive." To what does this word "then" refer? That is the question.—The last antecedent is, "after the purposes of the trust shall be "fulfilled." What are those purposes? Were they to be fulfilled in the lifetime of the brother David? for if not, David could not be the person to take, because he could not be the nearest heir "alive" when the purposes of the trust were fulfilled.

Now, of these trusts, the most important was to pay a legacy to David's family—but to be subject to his distribution. Upon this legacy, interest was to be paid from the truster's death, but if David survived, he was to pay the interest, if in possession of the estate of Brotherton, and the time of payment of the principal money was "to be postponed till the first term of "Whitsunday or Martinmas after the said David Scott's death "or as soon thereafter as conveniently may be without rendering "it necessary for the heirs succeeding to the estate of Brotherton "to sell or dispose of any part of the same, but to bear interest "from the said David Scott's death at four per cent. per annum "until paid." During David's lifetime therefore, the legacy was not to be paid; and until such payment, the trust was not

fulfilled; consequently David could not be the heir, living at the time of the fulfilment of the trusts, which is really the whole question.

The Appellant contends that the trusts have been fulfilled, by David and his existing family agreeing amongst themselves as to the distribution of the legacy. But this assumes the Appellant's construction to be correct, for unless "David's "family" mean the family as it existed at the truster's death, and unless the "heir then living" mean "heir" living before David's death, the parties to this arrangement are not all the parties interested. If a gift be to a class or to an individual by a description which cannot be ascertained till some future time, or future event, those who may answer the description at an earlier period cannot by any arrangement among themselves, exclude those who may become entitled at such future time or upon such future event happening.

The direction to apply the debt due to the truster from David in payment of his legacy cannot affect the question, that direction being to pay the legacy in manner beforementioned. The cases referred to in which the parties to take "hereafter" were ascertained can have no application. All parties who can be entitled, concurring, the period of the distribution may no doubt be anticipated.

I am, therefore, my Lords, clearly of opinion, and my noble and learned friend entirely concurs with me, that in this case the interlocutor appealed from was right and ought to be affirmed, and I therefore move your Lordships to affirm the interlocutor of the Court below.

It is Ordered and Adjudged, that the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutor therein complained of, be, and the same is hereby affirmed: And it is further Ordered, That the costs incurred by the said Appellant and

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Respondent in respect of the said appeal be paid out of the fund *in medio:* And it is also further Ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this Judgment.

RICHARDSON, CONNELL, and LOCH—SPOTTISWOODE and ROBERTSON.

[HEARD and JUDGMENT *27th July*, 1850.]

JAMES CLELAND, *Appellant.*

CLASON and CLARK, W.S., *Respondents.*

Process—Remit.—It does not form any objection to a remit *ob contingentiam*, that the process, in respect of which the remit was made, had been removed by appeal to the House of Lords, and that the appeal was still in dependence at the time the remit was made.

Ibid.—Ibid.—There is such a contingency between a process, in which a decree had been made upon the merits and decerning for payment of expenses to the agents of the party, and a suspension and liberation, brought by the unsuccessful party against the agents, in respect of irregularities in the extract of the decree and the subsequent procedure, as will justify a remit of the suspension and liberation *ob contingentiam* to the branch of the Court before which the original process depended.

Diligence.—A warrant to charge, poind, and imprison embodied in an extract decree, bearing to be made by the officer signing it as "Extractor of the Court of Session," shows that the warrant was made at Edinburgh, because Edinburgh is the commune forum.

Ibid.—The date at which an extract decree embodying a warrant to charge, poind, and imprison in virtue of 1 & 2 Vict. cap. 114, was made, does not require to be inserted *before* the signature of the officer signing the extract—it may be put *after* it.

Diligence—Statute.—The Statute 1 & 2 Vict. cap. 114, is directory not prereemptory as to the form of warrant to charge, poind, and imprison specified in its first schedule.

THE Act 48, Geo. III, cap. 151 enacts, in its 9th section, that all causes, actions, processes, or matters shall be heard

before that division of the Court of Session which the party instituting it shall choose, "provided that, where any action, "matter, process, complaint, or cause, has been brought "before one of the said divisions, or the Lords Ordinary "thereof, the other division, or the Lords Ordinary thereof, "shall remit any action, process, matter, complaint, or cause, "subsequently brought before them, relating to the same "subject, matter, or thing, or having a connection or contin- "gency therewith, to the consideration of the division or "Lords Ordinary before whom the first cause, action, process, "complaint, or matter, had been previously brought."

The 1st section of 1 and 2 Vict., cap. 114, is expressed in these terms:—"Whereas it is expedient to "improve the form and to diminish the expense of the dili- "gence of the law in Scotland against the persons of debtors, "and to amend the law as to the diligence of arrestment and "poinding: Be it therefore enacted by the Queen's most "excellent Majesty, by and with the advice and consent of "the Lords Spiritual and Temporal, and Commons, in this "present Parliament assembled, and by the authority of the "same, That from and after the thirty-first day of December, "one thousand eight hundred and thirty-eight, where an extract "shall be issued of a decree or act pronounced or to be "pronounced by the Court of Session, or by the Court of "Commission for Teinds, or by the Court of Justiciary, or "of a decree proceeding upon any deed, decree-arbitral, bond, "protest of a bill, promissory note, or banker's note, or upon "any other obligation or document on which execution may "competently proceed, recorded in the books of Council and "Session, or of the Court of Justiciary, the extractor shall, "in terms of the Schedule (No. 1,) hereunto annexed (or "as near to the form thereof as circumstances will permit), "insert a warrant to charge the debtor or obligant to pay the "debt or perform the obligation within the days of charge,

"under the pain of poinding and imprisonment, and to arrest "and poind, and for that purpose to open shut and lockfast "places; which extract shall be subscribed and prepared in "other respects as extracts are at present subscribed and "prepared."

The schedule No. 1, referred to in this section of the statute just quoted, is in this form:—

"And the said Lords grant warrant to messengers-at-arms, "in her Majesty's name and authority, to charge the said A "personally, or at his dwelling-place, if within Scotland; and "if furth thereof, by delivering a copy of charge at the Record "Office of the Keeper of the Records of the Court of Session "(*state what the party is decerned to do; if to pay money, "specify the sum, interest, and expenses; or if to fulfil an "obligation, specify it as in the decree or other document,*) and "that to the said B (*specify the name of the person in whose "favour the decree is pronounced*) within (*insert the appropriate "days*) next after he is charged to that effect, under the pain "of poinding and imprisonment (*if the sum or any part thereof "be payable at a future time, add here,* 'the terms of payment "'being always first come and bygone;'), and also grant "warrant to arrest the said A's readiest goods, gear, debts, "and sums of money, in payment and satisfaction of the said "sum, interest, and expenses; and if the said A fail to obey "the said charge, then to poind the said A's readiest goods, "gear, and other effects, and, if needful for effecting the said "poinding, grant warrant to open all shut and lockfast "places in form as effeirs. Extracted (*specify place and date*).

(*Extractor's Signature.*)

The same statute, 1 and 2 Vict., cap. 114, in its 5th section, enacts that it shall be competent, within year and day after a charge has expired, to present it to the "Keeper of the General "Register of Hornings at Edinburgh," who is to record the

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execution in his register, and this registration is to have the same effect as if the debtor had been denounced rebel, according to the forms then in use, and the 6th section enacts that on the execution being so recorded, the "Keeper of the "Register" shall write upon the extract, and upon the execution, if written on paper apart, a certificate of the registration thereof, "in terms, or to the effect of the Schedule (No. 3) "hereunto annexed, which he shall date and subscribe." This extract and certificate of registration are then to form authority for a deliverance by the clerk in the Bill Chamber, authorizing the imprisonment of the debtor.

The Appellant was Pursuer of an action of count and reckoning against Weir deceased, which was subsequently awakened against his representatives. The Appellant was also Defender in an action of multiplepoinding and exoneration at the instance of Weir. The object of these actions, which were conjoined, was to try the circumstances under which Weir had administered the estate of Williamson, under a will in Weir's favour, while there was in existence a will of a posterior date in favour of the Appellant. An issue was framed and tried in these conjoined actions, and a special verdict was returned. The Appellant took an exception to the charge at the trial. The exception was overruled by the Court, but was sustained by the House of Lords upon appeal, and a new trial was allowed. Upon the second trial a special verdict was again returned. This verdict was applied by the Court of Session by a judgment upon the merits of the question at issue between the parties, and by a finding that neither party was entitled to the expenses of the first trial, but that the Appellant was liable to his opponents in the expenses of the second trial, and of the subsequent proceedings to apply the verdict.

The Appellant presented an appeal against this judgment upon the ground that it was contrary to the intent and meaning of the verdict.

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While this appeal was in dependence, the opponents of the Appellant presented a petition to the Court of Session for interim execution of the decree for expenses against the Appellant, and prayed that the execution might pass in the name of the Respondents, their agents, and the disbursers of the expenses. The prayer of this petition was granted by a decree decerning for payment, and allowing extract of it to go out in the name of the Respondents *ad interim*. This decree was made by an interlocutor, which was pronounced on the 8th, but was not signed until the 11th of July, 1848. This circumstance was stated upon it by the proper officer.

The Respondents obtained extract of this decree which set out with the date 11th July, 1848, and was thus framed:—

"At Edinburgh, the 11th day of July 1848 years—sitting in "judgment, the Lords of Council and Session decerned and "ordained, and hereby decern and ordain, James Cleland of "Ravenshall, at present residing at Mavisbank Cottage, Govan "Road, near Glasgow, to make payment to Messrs. Clason and "Clark, writers to the Signet, agents for Mrs. Mary Weir or "Fleming, executrix of the late William Weir, of Shotts Inn, "in the parish of Shotts, and county of Lanark, and John "Fleming, farmer, Rouchrig, her husband, and John Weir, "farmer, Cleland Townhead, heir of the said William Weir, of "the sum of 141*l.* 14*s.* 1*d.*, being the taxed amount of expenses "found due to the Defenders, after deducting 3*l.* 3*s.*, to which "the said James Cleland was found entitled, in a conjoined "process of multiplepoinding, and exoneration, and count and "reckoning, and damages, depending before the said Lords "between the said parties: Item, To make payment of 17*s.*, "sterling, as the dues of extracting this decree: And the said "Lords grant warrant to messengers-at-arms, in Her Majesty's "name and authority, to charge the said James Cleland per-"sonally, or at his dwelling-place if within Scotland, and if "furth thereof, by delivering a copy of charge at the office of the

" keeper of the record of edictal citations at Edinburgh, to " make payment of the foresaid sum or sums of money, principal, " interest, and expenses—all in terms and to the effect contained ' in the decree and extract above written, and here referred to " and held as repeated *brevitatis causâ*, and that to the said " Clason and Clark, within fifteen days, if within Scotland, and, " if furth thereof, within sixty days next after he is charged to " that effect, under the pain of poinding and imprisonment; " and also grant warrant to arrest the said James Cleland's " readiest goods, gear, debts, and sums of money, in payment " and satisfaction of the said sum or sums, interest, and " expenses: And if the said James Cleland fail to obey the said " charge, then to poind the said James Cleland's readiest " goods, gear, and other effects, and, if needful for effecting the " said poinding, grant warrant to open all shut and lockfast " places in form as effeirs. Extracted upon this and the pre- " ceeding page by me, principal extractor in the Court of " Session. (Signed) " J. PARKER.

" November 4th, 1848."

By virtue of this extract and warrant, the Respondents gave the Appellant a charge for payment, and the charge having been disobeyed, they obtained a warrant for his incarceration, which was duly put in force. The Appellant presented a note of suspension of the charge, which he marked for the first division of the Court; the cause in which the decree extracted had been pronounced having depended before the second division. The Lord Ordinary allowed the Appellant to be liberated upon his consigning the sum charged for, and reported the case to the first division of the Court. The first division remitted the case to the second division " in respect of its contingency and near " connection with another case which is in dependence in that " division." The second division pronounced the following interlocutor:—" In, respect 1mo, That the Act of Sederunt,

" dated the 24th day of December, 1838, was not intended to " make any change in any form prescribed by the Diligence " Act, and in respect that the extract charged on in this case, " prepared in the form which has been in use in all cases for " ten years, does state the place where it was prepared, viz., in " the office of the principal extractor in the Court of Session, " and is dated on the day on which the same is completed and " issued: In respect, 2ndo, That the certificate of registration " issued from the keeper's office, is signed by an officer found " by the party applying for the same, to be in the actual exer- " cise of the duties of such office, and not averred by the " suspender to be an intruder into the office, and is issued from " the said office as the proof of the actual registration therein: " In respect, 3tio, That the execution refers to the date of the " decree, but does not state the warrant to be of the same date, " but only in common style mentions the warrant thereon that " is on the said decree, the date of which is given: In " respect, 4to, The interlocutor of Court forming the decree in " question, was verbally pronounced on the 8th day of July, " but was signed, and bears to be signed, on the 11th day of " July, according to the form and practice of the Court; and " in respect that in such cases the true date is that on which " the interlocutor was signed, when the cause was again in the " Roll of the Court for judgment, and by which the extractor " must be, and always is, guided in giving the date of the decree, " being the day on which the warrant for this extract is signed " and judgment finally completed: In respect, 5to, That the " bond of caution found by the parties in whose favour decree " for expenses was pronounced, necessarily applies to repetition " of the same in the event of a reversal, whether payment is " enforced by these parties directly, or by others, as in their " right and with their consent and concurrence, and that such " is the established rule and practice in cases where the decree " is allowed to go out in name of the agents of the party in

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" whose favour expenses are found due, and where interim exe-
" cution of the same is sought for, pending appeal; and in
" respect that no other objections were taken to any of the
" grounds and warrants of the said charge, or any other reason
" of suspension proposed,—Therefore the Lords remit to the
" Lord Ordinary to refuse the note of suspension and liberation,
" and to find the chargers entitled to expenses, and decern."

This interlocutor and that by the first division of the Court remitting the case *ob contingentiam* to the second division, were both appealed.

Mr. Anderson for the Appellant.—By the 9th sect. of 48 Geo. III. cap. 151, the Appellant was entitled to choose the division of the Court before which to bring the question of suspension raised by him. Availing himself of that right, he had marked the note of suspension for the first division, and unless there was a contingency between the suspension and a case previously in dependence between the same parties before the second division, the first division had no power to deprive him of the selection he had so made. No mention is made in the interlocutor of remit of the case in respect of which it was made so as to enable the party to discover it. It was thought at the time that the contingency referred to by the interlocutor was between the present case and one of Wilson *v.* Wilson, 11 *Dun:* 161. where a similar question had been raised before the second division; but that case had no other contingency with the present than that similarity, which is not such a contingency as the statute had in view, for it never could have been the intention of the legislature that where a particular question of law might be raised before one division of the Court, it should be in the power of the other division to remit all similar questions to it, and deprive the subject of the benefit of the opinion of the separate judicature upon one and the same question. The contingency in view by the statute was between two cases

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depending between the same parties in both, and having reference to the same subject of patrimonial interest; whereas the parties here were entirely different, the subject in disputewas different, and the case of Wilson *v.* Wilson had already been decided.

If the case referred to by the interlocutor was not Wilson *v.* Wilson, but the case between the Appellant and the representatives of Weir, in which the decree raising the present question of suspension was pronounced, the answer to that is threefold. In the first place, the parties in the two cases are not the same. The present Respondents were no parties to the original case, and Weir's representatives are no parties to this case. 2nd.—The present case is separate and independent, raising an entirely new question, no way involved in or having connexion with the questions embraced by the original action; and 3rd., the origina case was at an end, so far as the Court of Session was concerned at the time the remit was made—there was nothing remaining for that Court to determine, whatever might be the issue of the appeal taken to this House.

II. The extract and warrant forming the ground of suspension is void, and inept, inasmuch as it does not in terms of 1 and 2 Vict., under which it is framed, specify the place at which, and the time at which it was signed and issued, although both of these particulars are specified by the Schedule to the statute as necessary to be inserted, and therefore cannot be omitted. Syme *v.* Yuille, 8 *Co. of Sess; Ca.* 8. With regard to the date, that at the commencement of the extract is the date of the decree extracted, not of the giving out of the extract, which is an act that could not be done until the lapse of a certain time after the making of the decree; and the date, "November 4th, 1848," as it is found at the end after the extractor's signature, cannot form any part of the instrument, for the schedule to the statute not only requires the place and date to be specified, but points out the place in the extract where the specification is to be made.

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[*Lord Brougham.*—The schedule is sometimes part of an Act and sometimes not. The Court of King's Bench in this country have so held, according to the good sense of the matter, and it has been held that whatever comes under a "viz." in pleading is to be regulated by the sense of the passage.]

Admitting that, the objection here is nevertheless good, for it is obvious that what the schedule specifies is necessary, in order to prevent abuse, which might readily be introduced if it were allowed that the date may be placed out of the four corners of the instrument, and perhaps long after it has been completed. With regard, again, to the place at which the extract was made, there is no mention of it anywhere. The words "at Edin-"burgh," with which the extract commences, has reference to the place at which the decree was made, not to that at which the extract was given out. No doubt the person signing calls himself "principal extractor in the Court of Session," but that was obviously intended to describe his character, not the place where he was acting; and were this otherwise, the words would not have the effect contended for, because the Court of Session has sat away from Edinburgh, and may do so again; and for aught that appears, it was sitting elsewhere at the time this extract was issued.

III. The warrant of imprisonment was void, because the certificate of presentation and registration of the execution of charge was not in conformity to the enactment of 1 and 2 Vict. That statute requires that the certificate shall be signed by the Keeper of the General Register of Hornings; but the certificate here is signed "D. Craig, P. K." Craig was not, however, the Keeper, and who he was, nor what was meant by the letters "P. K." does not appear. Possibly the letters may be intended for "pro Keeper," but the statute does not give any authority to the Keeper to do the act by deputy, even if there were proof, of which there is none, that the person professing to be a deputy really held that character. This objection must be fatal

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to the diligence, for the certificate is the foundation of the warrant of imprisonment.—Forrester *v.* Harvie, 4 *Bell's Ap. Ca.*, 197; Cumming *v.* Munro, 12 *S. & D.*, 61.

IV. The extract of the decree is further void, because it sets out the date of the decree as the 11th of July, 1848, being the day on which it was signed, whereas the true date was that on which the interlocutor was pronounced, viz., the 8th of July.

Mr. Rolt and *Mr. Adolphus*, for the Respondents.

LORD BROUGHAM.—My Lords, I do not think it necessary that your Lordships should delay disposing of this case. Although the amount of money in question is a trifling sum, yet the case certainly involves considerations of importance. I am, however, prepared to recommend that your Lordships should dispose of it at once.

There are two grounds alleged in support of this appeal. One, that the remit to the second division from the first, upon the question *ob contingentiam*, was improper, because there was no real *contingentia*. The second is, that there are fundamental irregularities, radical irregularities, which are sufficient to vitiate the whole proceeding.

With respect to the first of these points, I certainly hold the opinion which was held by the Court below, that there is a *contingentia*. It is a complete mistake to suppose that the Act which prescribes a remit in case of contingency requires that there should be a *lis pendens* before the Court to which the remit is made at the time of making the remit. The direction is in the past tense. The Act requires that there must have been *de facto* a suit pending there at some one time, and however that suit may have been disposed of, whether it continue pending or not at the time in the Court, it was quite sufficient if that suit had been there instituted and had there subsisted,

and though the suit might, in its course of proceeding, be, I do not say altogether determined, but removed to another Court, the Court of Appeal, your Lordships' House, in which it might then be locally situate, that would make no difference; for the words are, "Provided that where any action, matter, process, "complaint, or cause has been brought before one of the said "divisions, or the Lords Ordinary thereof, the other division or "the Lords Ordinary thereof shall remit any action, process, "complaint, matter, or cause, subsequently brought before them "relating to the same subject matter, or thing, or having a con-"nexion or contingency therewith to the consideration of the "Division or Lords Ordinary before whom the first cause," that "is the first mentioned cause, "action, process, complaint, or "matter had been previously brought."

Now it is said that this case was so far at an end that nothing of it subsisted, save a petition which had been presented for interim execution, pending the appeal here, and that this petition having been acceded to by interim execution being granted, was also at an end, and that, therefore, there was nothing through which the contingency could be asserted, which was the ground of remit under the interlocutor. My Lords, I deny that. The suit of Cleland *v.* Weir, which had given rise to this suit, and was intimately connected with it, was here pending; and there might have been a remit from this House in that suit of Cleland *v.* Weir at the time at which this remit took place. Then was there a contingency, was there a suit upon the contingency of which there might have been a ground of remit? Was there such a similarity, a connection with the subject matter of that suit as to justify the remit within the words of the statute? I apprehend that there was a connection, and one cannot very well conceive a connection more close than between a suit in which a judgment is had, and one in which the execution taken upon that judgment is the subject

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of it. I am therefore of opinion that there was such "connection or contingency" as justified the remit by the Court below.

But your Lordships have been referred to the case of the Earl of Mansfield *v.* Aitchison; and I was anxious to see that case; for, as stated at the bar, it did seem to have some bearing upon the question now before your Lordships. In that case, a question arose, not upon a remit *ob contingentiam*—for a most material difference exists in that respect, as I shall presently show—but it was upon an advocation *ob contingentiam*, and there the test seems to have been, whether or not the processes should be formally conjoined; otherwise there could be no advocation, for obvious reasons. Now the Court before whom the question came, (it never was here by appeal,) were equally divided. Two learned Judges thought there was no contingency, one being Lord Glenlee, an eminent and most able person, of whom, while I wish to speak with the greatest respect, it must be observed that he was apt to doubt, and afterwards to express his final opinion with hesitation; the other being Lord Cringletie, a Judge fully entitled to our respect also, but of inferior estimation to the former; the others who joined in the decision were the Lord Justice Clerk and Lord Pitmilly, two of the most eminent Judges who ever sat upon the Scotch bench. They had no doubt whatever that there was a contingency sufficient to support the advocation claimed; and they gave their opinion accordingly. What followed? The Court being equally divided, says the reporter, it was agreed upon and proposed by the Lord Justice Clerk to take a very excellent course,—not to hear one counsel on a side, which would have given rise to delay and expense, but to refer it to Lord Moncrieff,—the Lord Ordinary, in the Bill Chamber, from whom it had come, by his reporting that he had a doubt whether he should refuse or pass the bill—to him they determined to refer it. And they were to be guided by his decision between the two conflicting

portions of the Court, that is, the equal two on each side. What happened? Lord Moncrieff gave his decision, which I presume proceeded—by reference to his statement—upon the same grounds as those upon which he made his report. Observe what these grounds are. If you look at them you will find that they are confined to the question of inconvenience. He seems to have had great doubt on the point; and your Lordships find, whatever it was that determined him, when the reasons on each side hung about as even as the numbers on each side hung in the Court, it was a consideration of the nature of the case. What was that? An advocation. He goes upon the ground of the inconvenience which might arise in such a case. He specifies the reason which guided him, viz., because it was an advocation. Therefore I agree entirely with the two learned Judges, the Lord Justice Clerk and Lord Pitmilly, and differ, with great respect, from Lord Glenlee and Lord Cringletie. I do not say I am obliged to differ with Lord Moncrieff, because he rests his opinion upon the peculiarity of that case, an advocation *ob contingentiam;* and on reasons drawn from thence, which do not apply to the matter before your Lordships.

This brings me, therefore, to the second ground of appeal before your Lordships, viz., with respect to the practice of the Court, which was one of the points raised in the argument. Now, I do not say that if a clear case was made out of the practice having been wrong, as Lord Robertson, an able and experienced Judge, in his very elaborate note, appears to have thought it, it would not be the duty of this Court of Appeal to amend the *mala praxis* by putting a better in its place. You would reverse the judgment which had gone upon a mistaken view of the practice. But, generally speaking, your Lordships, where such a question comes before you upon the proceedings in any inferior Court, are very slow to say that it did not understand its own practice. The course of every Court is the law of the Court. You would only interpose as a correcting power where

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it appeared that there had been most clearly a miscarriage, and that the Court had misunderstood its own practice. But in a case like the present, in which there is a unanimous opinion, with the exception of Lord Robertson, in the second division, it is a very strong thing to say that those learned Judges so far lost their way as to decide in ignorance of their own practice. I do not think that there is any circumstance to justify such a conclusion.

My Lords, upon all these points their Lordships have given a very strong opinion unanimously, with the exception of Lord Robertson. I have looked with great anxiety into every argument adduced, and into the different points of the case, and I am decidedly of opinion that, independently of the weight due to their Lordships' authority upon the question of practice, they have decided rightly; and that the practice is not at all interfered with, even taking the schedule, the Act of Sederunt, and the pieces of the process, and comparing them together.

It is very important to consider what was the object of the Act of the 50th George III. cap. 112, and the other statutes for regulating the Scotch judicature, what was their origin, and what their purview, what they were introduced for, and what they were dealing with? It appears to have been the purpose of these statutes (I am now speaking particularly of the Governing Act, the 1 and 2 Victoria, cap. 114,) to have required the insertion, where an extract shall be issued, of a warrant to charge the debtor or obligant, which warrant is to pursue as nearly as possible, the form of Schedule No. 1 to the Act annexed, not literally, not verbally, not following every letter, but as nearly as the circumstances will permit. In these terms the extract is to "insert a warrant to charge the debtor;" now that is the object of the Act.

Then comes the warrant in Schedule No. 1. Nothing is given there as to the extract: there is no new point of extract provided by the Act, nor by the warrant to which the Act refers.

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It is the warrant that is the subject of the Act; the insertion of the warrant is the object of the Act; and the form of the warrant is what the schedule provides. But there is nothing there said about the extract. The Act says "which extract "shall be subscribed and prepared in other respects" (that is in other respects than hereinbefore named and provided) "as "extracts are at present subscribed and prepared, and for which "extract no higher fees shall be exigible than those which are "payable as by law established." Then comes the warrant which is to be inserted. The form of the warrant given must be pursued, and as I had occasion to throw out before in the course of the argument, it is most material that the form of the warrant should be accurately pursued. The very object of the schedule is to require that it shall be inserted, and the object of the Schedule No. 1. is to give the form by which the warrant shall be framed. It is, however, one thing to say that you shall pursue the warrant strictly in the form given, but it is another thing to say that the words which follow the word "extracted," must be precisely as given in Schedule No. 1. The words are "extracted [specify place and date]." That only refers to the extract and not to the warrant. It refers to that which is done with the warrant, namely, "extracted."

Now it is said that the portion which in this case follows the word "extracted," does not contain either place or date. I am astonished to find that it is said not to contain the date, when you find the date "November 4th, 1848," and the signature "J. Parker," the name, James Parker, being that of the principal extractor. True, it happens that after the name "J. Parker," follows the date, but even if it were necessary to follow the prescribed form to the very letter, is any one prepared to say, that we can find anything which declares that the date must be before the signature, and immediately after the word "extracted," and not after the signature? No such thing can be said. The words "specify place and date," are by juxta-

position, attached to the word "extracted," but that is all. It does not say you must put the date in here, and if you do not put it in here, but put it in after the name, the whole shall be null and void. It seems to me that this would be the most absurd construction which could be put upon any plain and simple words.

Then it is said that the place is not there. I am supposing it is necessary to put the place, though, according to my argument, for the reasons which I have already assigned, that is not required. But supposing it were required; suppose that instead of being merely directory, the provisions were peremptory, is not there the place here? Taken altogether, nobody can doubt it, because it is "extracted upon this and the prece-" ding page by me, principal extractor in the Court of Session." I certainly deny the position attempted to be set up, that the Court of Session is an ambulatory body. It is as much a fixed body by the Common Law as the Court of Common Pleas is by Magna Charta. It cannot move from Edinburgh, that is the *Commune Forum*, the whole proceedings in criminal cases, as well as civil go up, on the supposition that Edinburgh is the *locus in quo* of the Court of Session. By the Common Law of Scotland, any party may be tried for any offence, misdemeanour, felony, or murder, in the county in which it is alleged to have been committed, or in Edinburgh. Why? Because Edinburgh is the *Commune Forum*, where sits the Court of Session, the highest Court of Judicature within the country. I do not consider, however, that it is necessary to rest any opinion upon that view; for independently of it, I think the place is sufficiently indicated, the known fact being that Edinburgh is the seat of the Court, and that no Circuit Court is ever termed Court of Session.

My Lords, the other points do not require that I should go further into them. I have given a sufficient proof, I think, of

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the futility of the grounds of appeal, to justify me on the whole in advising your Lordships to affirm this decree.

It is Ordered and Adjudged, That the said petition and apppeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellant do pay, or cause to be paid, to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DUNN and DOBIE—TATHAM, UPTON, JOHNSON, UPTON, and JOHNSON.

[HEARD *26th February*—JUDGMENT *29th July*, 1850.]

ARCHIBALD THOMAS F. FRASER, ESQ., of Abertarff, *Appellant.*

THE RIGHT HON. ALEXANDER LORD LOVAT, *Respondent.*

Arbitration.—Res Judicata.—Terms of Reference by mutual memorial of parties and of opinion expressed upon it by the referee held to be sufficient, whereon to support a plea of *Res judicata*, in respect of matters made the subject of a subsequent action.

BY the 43 Geo. III., c. 80, which was passed for the purpose of raising money towards the construction of roads and bridges in the Highlands of Scotland, it was enacted that it should be lawful "for any corporation, or the tutor or curator of any infant "or lunatic, or other person under any disability or incapacity "possessed or entitled to a real estate, or any heir of entail in "possession of any entailed estate in any county of Scotland "through which any such road shall pass, or in which any such "bridge shall be situated, his or her tutor or tutors, curator or "curators, with the consent of the said Commissioners, to con- "tribute towards the making of such roads, or erecting of such "bridges, respectively, any sum not exceeding one year's free "rent of such estate; and, for that purpose, it shall and may be "lawful for such corporation, tutor or curator, or heir of entail, "or his or her tutor or curator, to charge such estate with any "sum not exceeding one year's free rent thereof, to be borrowed "for the purpose of contributing towards the expense of making "any road, or erecting any bridge in said counties respectively, "under the provisions of this Act, which sum, so contributed

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" or borrowed shall be paid as herein before directed, to be " placed to account of the said respective roads or bridges."

By another section of the same statute it was enacted that every heir of entail contributing should be bound to keep down the interest of the sum borrowed, and that so soon as the road or bridge should be completed, he should be obliged every year to pay the Commissioners appointed by the Act, a sum equal to 3*l.* per centum of the sum borrowed as a sinking fund to pay off the loan.

By the 44 Geo. III., c. 75, which was passed for assessing proprietors of lands in the county of Inverness towards the expense of making and supporting the roads and bridges authorized by the previous statute, the heritors of the county were authorized to bind themselves to the Commissioners of the Roads and Bridges for payment of one-half the expense of constructing any road or bridge which they, the heritors, might approve of, and to require the Commissioners of Supply of the county to assess every proprietor for payment of his proportion of the sum assessed. Heirs of entail were allowed to charge their lands with the amount of the sum assessed upon them under the same obligation upon them as in the previous statute, in regard to keeping down the interest upon the sum to be so charged, and to provide, during their possession, a sinking fund for its ultimate liquidation; and " where any person or persons " have already paid, or found security to pay, or shall hereafter " pay, or find security to pay, the sums necessary towards " making any road, or erecting any bridge in the said county in " the manner directed by the said recited Act" (being 33 Geo. III., cap. 80, above noticed) " such person or persons shall not be " liable to pay his, her, or their proportion of any assessment to " be made pursuant to this Act, unless or until such proportion " shall amount to a sum equal to one-half of the estimated " expense of such road or bridge which they have paid, or found " security to pay, in the manner directed by the said recited

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" Act, or until they are repaid one-half of such estimated expense " in manner herein directed."

In January, 1806, the Honourable Archibald Fraser, heir in possession of the entailed lands of Lovat, in the county of Inverness, granted a bond over those lands in favour of the Road Commissioners for payment of 357*l.* 10*s.* towards the construction of the Fort Augustus road—that sum being one-half of the whole estimated expense. This bond recited the Act 43 Geo. III., bore to be "in terms of the said Act," and conveyed the lands of Lovat in security, but contained a declaration " that, although the granter's heirs whatsoever were bound in " payment, yet, as the money was to be expended in ameliorating " the entailed estate, the heirs of entail succeeding thereto should " be bound and obliged to free and relieve his other heirs of " and from payment of the same, and all the consequences " thereof."

This road was completed by the year 1810; and during the period between 1806 and that year, Fraser was allowed to retain the assessments which were made upon his lands under the 44 Geo. III., in relief of the obligation he had come under by his bond.

In October, 1810, Fraser applied the amount of these assessments towards payment of the sum in his bond; and in order, as was alleged, to keep the amount as a charge upon his lands, he took an assignation of the bond, in favour of Dundas as his trustee.

In March, 1811, Fraser likewise granted an heritable bond over his entailed lands in favour of the Road Commissioners for payment of the sum of 5,237*l.* 10*s.*, being half the estimated expense of building the Beauly Bridge. This bond also recited the Act 43 Geo. III., and bore to proceed in terms of it. During the time that the bridge was in course of construction, Fraser was, as in the other instance, allowed to retain the assessments made upon his lands in respect of the bridge in

relief of his obligation under this bond. By the year 1815, the amount so retained had come to the sum of 2,382*l.* 5*s.* 2*d.*, and in that year he was likewise paid out of the general assessments of the county, in further relief of his liability, the sum of 869*l.* 13*s.* 9*d.*, these two sums making an aggregate of 3,251*l.* 18*s.* 11*d.*

In October, 1815, Fraser paid this sum of 3,251*l.* 18*s.* 11*d.* to the Road Commissioners in liquidation of his bond of 1811, and some correspondence took place between him and his agent with a view to a conveyance being taken of the bond, as had been done in the case of the bond for the Fort Augustus Road, but before this was accomplished, Fraser died on 8th December, 1815.

In 1818 the Respondent, who had succeeded Fraser as heir of entail of the lands of Lovat, paid the Road Commissioners the balance owing upon Fraser's bond of 1811, after deducting his payment of 3,251*l.* 18*s.* 11*d.*, and took from them a discharge and renunciation of the bond, so as thereby to extinguish it as a charge upon the lands against him and the succeeding heirs of entail.

The Appellant, who was the general disponee and executor of Fraser, disputed the right of the Respondent to take this discharge and renunciation, and with a view of settling this dispute and other claims which the two parties had upon each other they agreed in signing a "joint memorial" addressed to Mr. James Keay, Advocate.

This memorial recited the clauses of the two statutes which have been noticed, and then proceeded thus :—

"1. The late Honourable Archibald Fraser became a con-
"tributor to several roads under the statutes referred to, and
"he granted bond over the entailed estate of Lovat, as autho-
"rized by the former of these statutes, for a moiety of the esti-
"mated expense of the Beauly or Lovat Bridge, amounting to
"4,734*l.* 4*s.* 5*d.* The roads to which he contributed were the

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"Fort-Augustus, Inverfarigaig, and Beauly roads, and he "charged the said estate with his contributions to these roads "by granting bonds to the Commissioners. He granted two "bonds on account of the expense of the Beauly road, one for "1239*l.* 11*s.* 2*d.*, and another for 638*l.* 10*s.* 2*d.* He made "payment of 3,251*l.* 18*s.* 11*d.* in October, 1815, to account of "the bond granted for the moiety of the estimated expense of "the Lovat Bridge, and the present Lovat paid up to the Com- "missioners the balance of that bond, as well as the amount of "the other two bonds in February, 1818. Abertarff has since "settled accounts with the county for the other roads, to which "the deceased contributed, under reservation of his claim of "relief against the county and Lovat. He has, however, "retained the Parliamentary Road Assessments affecting the "lands of Abertarff, &c., to which he succeeded since the late "Lovat's death, on the following grounds,—(1.) That some of "his author's engagements for roads may still remain undis- "charged, and that, at any rate, he has claims for the expense of "securities granted by the late Lovat for his contributions "towards roads and bridges; and (2.) That he has a claim "against Lovat (which, however, is not admitted by the other "memorialist) for a large proportion of the assessment exigible "from the Lovat estate during the late Lovat's lifetime, in "virtue of the above quoted clauses of the said Acts autho- "rizing heirs of entail to charge their estates with their "contributions to roads and bridges, and also with their "assessments.

"2. The learned Counsel will observe that contributors to "roads and bridges were entitled to retain their assessments to "the extent of half the estimated expense of such roads and "bridges. They were also ranked on the general road funds "of the county, levied from non-contributing heritors for a "moiety of these estimates, less their retained assessments. In "some instances, the actual expense of these works fell short

" of the estimated cost, and this happened in the case of the " Lovat Bridge, where the difference was considerable. In the " year 1823, a general state of the Parliamentary Road and Bridge " Accounts was made, in which, in every case, the actual expense " was stated to the debit of the county; and, from this state, " it appeared that the contributor to the Beauly Bridge had, by " the application of retained assessments and payment of divi- " dends, been overpaid (including interest to the 30th April " of that year) no less a sum than 1322*l.* 0*s.* 2½*d.*, which, with " the interest since accruing, the county now claims from " Lovat, who retained part of the said assessments. He, how- " ever, maintains that Abertarff, as the late Lovat's executor, " is liable for more than one half of the balance claimed, the " overpayment having chiefly arisen prior to his death, and " he refers to the account prepared by the county accountant " in proof of this fact; but Abertarff does not admit his " liability for any part of the said balance, for the reasons " stated above.

" 3. Under the clause of the local Act of 1804 (quoted above), " which authorizes an heir of entail to charge the entailed " estate with the amount of the assessment, in the manner " prescribed by the Act of 1803, in the case of an heir of entail " borrowing money on the security of the entailed estate, on " account of the expense of roads and bridges, Abertarff main- " tains that he has a claim against Lovat, as the heir now in " possession of the Lovat estate, for the whole assessments " affecting that estate, down to the period of the late Lovat's " death, under deduction of three per cent. yearly on the amount " as a sinking fund, and the interest, in consequence of the late " Lovat having granted bonds over the estate for the original " contributions, in terms of the general Act of 1803, and of his " having retained the whole of his assessments in virtue of the " local Act of 1804, down to the period of his death, and no " final settlement having taken place. But Lovat contends

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"that his ancestor cannot be held to have availed himself of "the provisions of the local statute of 1804, authorizing the "estate to be charged with the assessments, and that therefore "his executor cannot possibly have any claim against him on "account of these assessments.

"The learned Counsel will be pleased to answer the "following queries:—

"1. Is Abertarff, in the circumstances stated above, bound "to pay up the whole or any part of the Parliamentary road "assessments retained by him as aforesaid? Or is he entitled "still to retain these assessments on the grounds stated by "him?

"2. Is Abertarff, as the late Lovat's executor, liable to "Lovat for, or to relieve him of, any sum that shall appear "to have been overpaid the deceased, by retention of assess-"ments or otherwise, on account of his advances for the Lovat "Bridge at the time of his death?

"3. Has Abertarff a claim against Lovat, for the whole or "any part of the Parliamentary road assessments, which were "payable out of the estate of Lovat during the late pro-"prietor's lifetime, under the clause of the local Act of 1804, "which declares that an heir of entail may charge the entailed "estate with the assessments thereby imposed, or in virtue of "the general Act of 1803?

On the 13th November, 1830, a paper entitled "Notes by "the Arbiter in reference between Lovat *v.* Abertarff," was issued by Mr. Keay; the concluding paragraphs of this paper were in these terms:

"5. It appears to me that the assessment for the district-"roads not being payable till 25th March, and being an assess-"ment not for the recovery of funds previously expended, but "an assessment for raising money to be afterwards laid out, "Lovat, and not the executor, was bound to have paid it.

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"6. If the late Lovat was entitled to retain a certain proportion of the assessment imposed upon his estate, in relief of "the engagements which he had undertaken to the Commissioners for Roads and Bridges; and if, from an exaggerated "estimate of the expense of the works, he was led to retain a "larger sum than the half of that which was truly expended, "and for which alone he was bound, I must consider the "assessment so retained without authority, as still in arrear, "and therefore a debt due by the executor.

"The late Lovat having, in terms of the Act 43, Geo. III, "come under certain obligations for the expense of making "county roads, rendered (as I understand) those engagements "burdens on his entailed estate, in terms of that statute. By "the Statute 1804, he was entitled to retain a certain portion "of the assessment imposed on his estate, in relief or extinction "of those engagements. He did so,—and thus the burden upon "the succeeding heirs of entail was so far diminished. I cannot see any ground for maintaining that the full amount of "the bonds (under the deduction only of three per cent. "annually) is to be held as still due by the heir of entail, while "the executor is to have right to the whole assessments, which, "during the late Lovat's life, were actually applied towards "reduction of those bonds."

These notes were afterwards copied over into a paper entitled "Award by Mr. Keay in said Reference," and duly signed by him in November, 1830.

In the year 1842 the Appellant brought an action against the Respondent, the summons in which set forth the matters which have been detailed, and after averring that the Appellant, as the general disponee and executor of Fraser, had right to the sums which Fraser had advanced for the construction of the two roads, and that the Respondent was liable in payment of the interest upon the said sums and of three per cent annually of

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their amount after the death of Fraser until the whole amount should be liquidated, concluded against him for payment of the sums in the bond, with interest from the time of Fraser's death (the sinking fund being now equal to their full amount), under deduction of interest and of the annual payment to the sinking fund up to the time of Fraser's death.

The Respondent pleaded *inter alia* in defence of this action, that the subject-matter "is *res judicata* in the submission "entered into by the present parties to Mr. James Keay, by "his final award thereon in 1831; and the Pursuer is barred "thereby from insisting in the present action."

The Lord Ordinary (*Cuninghame*,) sustained the action by finding that the pleas urged by the Respondent in defence, were not well founded, and he accompanied his interlocutor by a note which, as to the defence of *res judicata*, was in these terms: "(3.) The third and last plea of the Defender, against entering "into any accounting for the claims libelled on, was founded on "an opinion given by the late Mr. James Keay, advocate, to "whom it is said the question was referred, and decided in "favour of the Defender.

"On attending, however, to the opinion of Mr. Keay, it is "plain that he gave no decision against the claim of the Pursuer, "although he laboured under some misconception as to the "state of the case, which would doubtless have been removed "if he had been required to adjust the claims of the parties "precisely in a decree-arbitral, which he never was. The "opinion, called an award, by Mr. Keay, is dated 28th January "1831, and it is manifest, from its terms, that he by no means "declared the whole amount of the bonds, or of the corres-"ponding assessments included therein, as extinguished. If "that had been his meaning, he would at once, and in explicit "terms, have declared that all claim of Abertarff under the "bonds or statutes was irrelevant or discharged. But the

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"opinion is very differently expressed. Mr. Keay, in his "answer to the memorial, alluded to the statutes, and then "concluded his response with the following sentences:—"'By "'the statute 1804, he was entitled to retain a certain portion "'of the assessments imposed on his estate, in relief or "'extinction of those engagements. He did so,—and thus the "'burden upon the succeeding heirs of entail was so far dimi- "'nished. I cannot see any ground for maintaining that the full "'amount of the bonds (under the deduction only of three per "'cent. annually), is to be held as still due by the heir of entail, "'while the executor is to have right to the whole assessments "'which, during the late Lovat's life, were actually applied "'towards the reduction of these bonds.'

"There was here a mistake, of the nature of an *error calculi*, "as to the amount of the claim of the executor, which is quite 'palpable. Mr. Keay seems to have supposed (perhaps from "some indistinct explanation, written or verbal, of the country "agents), that the executor claimed right both to a part of the "bonds, and to the whole assessments, unpaid during the late "Lovat's life. That would, indeed, have been a glaring *pluris "petitio*; and it was that plea only that Mr. Keay repelled. "*Quoad ultra*, the Lord Ordinary infers, from Mr. Keay's "words, that if Lovat had not retained his assessments, but "paid them up, that then his executor was entitled to claim "such part thereof from the heir of entail as the statutes autho- "rized to be laid on the entailed estates. What that was "required an accounting between Lovat and the subsequent "heir, which Mr. Keay evidently supposed was to take place in "conformity with the statutes. It is apprehended, therefore, "that the accounting now directed to be made by Mr. Lindsay "is in accordance with the probable views and meaning of Mr. "Keay, as indicated in his opinion."

The Respondent reclaimed to the inner house, which recalled the interlocutor of the Lord Ordinary, and found "that the

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"subject-matter of the present action is *res judicata* in the "submission entered into by the present parties to the late Mr. "James Keay, by his final award thereon in 1831, and that the "Pursuer is barred thereby from insisting in the present action: "Therefore, dismiss the present action, and assoilzie the Defender "from the conclusions thereof."

This interlocutor was the subject of the appeal.

Mr. Bethell and *Mr. Robertson* for the Appellant: The paper entitled Award does not amount to a positive finding so as to form a decree-arbitral, but is a mere *obiter* explanation of what the referee had previously stated in his notes. At all events, the whole facts had not been presented to the referee by the memorial, as it was silent in regard to the fact that Fraser had granted heritable bonds over his lands for payment of the sums in question, by deeds professing in terms to be made under the power given for that purpose by the Act 43 Geo. III., and so had actually made the sums in question a charge upon the lands, which the Appellant, as the next heir of entail, was by the statute bound to liquidate.

The memorial did not contain a general reference of all questions, but of certain specific ones. No question was put by it to the arbiter in regard to the effect of the bonds under the 43 Geo. III.; accordingly his mind was directed entirely to their effect under the Act of 44 Geo. III. But even if the first of these questions had been put, it was not answered—the award is silent upon the subject—the arbiter merely says that the Respondent is entitled to have from the Appellant, the sum which Fraser had put into his own pocket out of the assessments, and that the Appellant could not set off against that claim, a sum which he was entitled to insist should be made a charge upon the Respondent's estate.—In truth, nothing as to the nature or effect of the bonds was either submitted to the arbiter or answered by him.

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Mr. Andrews and *Mr. Anderson* for the Respondent.

LORD BROUGHAM.—My Lords, in this case of Fraser *v.* Lovat I agree entirely with Lord Cottenham, the late Lord Chancellor, in his opinion upon it. His Lordship has favoured me with a note of his opinion, which I shall read as the ground of the judgment I am about to advise that your Lordships should give.

His Lordship says, "The Court of Session decided this "case upon the ground that the matter of this suit having been "submitted to the judgment of Mr. Keay, and he having given "two opinions against the claim of the Appellant, the matter "was to be considered as *res judicata*, and not subject to be "re-opened in this suit. Upon this point the Judges of the "Court were unanimous, and the Lord Ordinary, Lord Cuning-"hame, admitting the principle, thought that Mr. Keay had "been under some misapprehension as to the facts or the claim, "and that the principle therefore did not apply. That is, that "the opinion of the referee was not correct. It is obvious that "if it were competent for a party to question the correctness of "the opinion of the referee, the whole matter would be open. "I consider, therefore, the whole question to be, Was the "claim, as insisted upon by this summons, submitted to the "judgment of Mr. Keay, and decided upon by him? Three "points are to be considered,—First, What is the claim between "the parties? Second, Was it submitted to and decided by "Mr. Keay? Third, Is it the subject of the present summons? "The claim arises from the provisions of the Acts of 1803 and "1804. By the Act, 1803, owners in possession of entailed "estates were authorized to borrow upon and to charge the "entailed estates with sums not exceeding one year's income, "to be advanced to the Commissioners for making Roads and "Bridges in the Highlands, of which they were to keep down the "interest and to pay 3*l.* per cent. towards replacing the sum so "borrowed and charged. By the Act, 1804, the heritors of the

" county of Inverness were authorized to charge the whole of " the lands with the sums necessary to be advanced, which were " to be repaid by assessment upon the lands. Heirs of entail " had the same power of charging their entailed estates with " the amount of the assessment made upon such estates as was " given by the former Act. Heritors were authorized to advance " the sums required for the security of the assessments out of " which, when collected, they were to be repaid, but were to " deduct the amount of their own assessments.

" In 1806, a road, called the Fort Augustus road, being " projected, Lovat, the then owner of the entailed estate in " question, instead of borrowing or paying the money, was " permitted by the Commissioners to give security for the sum " to be advanced, and he accordingly, by bond and disposition " in security, dated 12th January, 1806, bound himself to the " Commissioners to make the advance required; and professing " to proceed under the powers of the Act of 1803, charged the " entailed estates with the amount, and at the end of this instru- " ment, after reciting that such road would be beneficial to his " entailed estate, Lovat declared that his heir of entail should " free, relieve, and indemnify his heirs general from the pay- " ment of such sums of money, and all the consequences " thereof. The sums so secured to the Commissioners having " been paid to them, they, in 1810, assigned this security to " Dundas in trust for Lovat.

" In 1811 a bridge, called the Beauly Bridge, being pro- " jected, Lovat was permitted to give security to the Commis- " sioners for 5,287*l.*, the sum required to be advanced, by a bond " and disposition in security, in every respect similar to the " former. This instrument professed to be founded upon the " Act of 1803, but it reserved to himself the right of relief " against the other heritors of so much of the sum contributed " as should exceed his proportion, which could only be done " under the Act of 1804, and by pursuing its provisions. Lovat " died in 1815. The Respondent is his heir of entail, and the

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"Appellant his representative and general disponee. It is "obvious that these two Acts, and the mode in which these "provisions had been dealt with, were calculated to raise ques- "tions between the executor and the heir of entail; and "accordingly these parties agreed to take the opinion of the late "Mr. Keay, and to be bound by his opinion, as is expressed in "the case submitted to him. The case stated those two Acts, "and the bonds, and that the Appellant claimed against Lovat, "the heir of entail, the whole assessments affecting this estate, "down to Lovat's death, subject to the deduction of the 3*l.* per "cent., in consequence of the granting of the bonds, and his "having retained the whole of the assessments up to the time "of his death; and the third question was, whether he had a "claim against the Respondent for any part of the road assess- "ments payable out of the estate of Lovat during the late "proprietor's lifetime, under the clause in the local Act of "1804, which declares that the heir of entail may charge the "entailed estate with the assessments thereby imposed, or in "virtue of the general Act of 1803?

"The abitrator, having expressed an opinion against the "claim of the Appellant, gave the parties notes of such opinion. "He was over again attended by them, but he adhered to the "opinion before expressed. If the executor had been able to "satisfy the referee that he was entitled to be paid by the heir of "entail any part of the monies so advanced by the late Lovat, on "account of the road and bridge, he would have been entitled "to his opinion and award to that extent, but the referee "entertained an opinion against any such claim. What then "does the summons in this suit seek to obtain? Payment by "the heir of entail of the sums of 440*l.* 5*s.* 3*d.* and 2,918*l.* 18*s.*, "being the principal monies paid by the late Lord Lovat to the "Commissioners, and for which he was liable under his secu- "rities to them, subject to certain deductions, not important to "the present question.

"For this extended claim there could be no pretence; for,

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"of the sum paid by the late Lovat to the Commissioners, a "large proportion has been, or was to be repaid by the other "heritors by the assessment made upon their lands, and the "only question which could arise between the present litigants "would be the assessments for the Beauly Bridge expenditure "upon the entailed estate of the parties; but although the "extra claim is unfounded, it evidently includes the lesser, "which is 'part of the road assessment payable out of the "'estate of Lovat,' the very terms of the question submitted "to Mr. Keay. It appears to me, therefore, that as to the "bonds on assessments, there is no case made by the Appel-"lant, and that as to the property assessed upon, and the sums "which might have been charged upon the entailed estate, the "opinion or award of Mr. Keay is conclusive against the claim "set up by this summons. I am therefore of opinion that the "interlocutors appealed from are right, and that this appeal "ought to be dismissed with costs." Thus far Lord Cottenham and his argument exhausts the whole matter, leading to a conclusion supporting the judgment of the Court below upon each head, and I entirely coincide with my noble and learned friend.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same is hereby affirmed: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be be lawful and necessary.

RICHARDSON, CONNELL & LOCH.—G. & T. W. WEBSTER

[HEARD *25th July*—JUDGMENT *1st and 2nd August*, 1850.]

ELIZABETH IRVINE or DOUGLAS, wife of William Robert Keith Douglas, Esq., commonly called Lord William R. K. Douglas; the said LORD W. R. K. DOUGLAS; and MISS CHRISTIAN C. IRVINE, *Appellants.*

JOHN KIRKPATRICK, Esq., Advocate, *Respondent.*

Process.—Issue.—One issue should never embrace two questions; each question should be put as a separate issue.

Time.—Fraud.—Where a transaction is attempted to be set aside on the ground of misrepresentation and concealment, the lapse of very considerable time, before the challenge is made, is a topic for consideration, and a reason for holding the party to the strictest pleading and evidence.

Fraud.—Misrepresentation.—Statements held not to amount to an averment of misrepresentation.

Ibid.—Concealment.—Concealment, to form ground for a charge of fraud, must be of something which the party using it was bound to disclose.

Ibid.—Ibid.—Facts and information possessed by a party negotiating with another, held not to be such as he was bound to disclose to the other.

IN the yecar 1798, Charles Irvine died while in Scotland, leaving very considerable real and personal estate, situated in the Island of Tobago and in Scotland. He was survived by two brothers, Walter (the eldest, his heir at law,) and Christopher, and by four sisters, Mrs. Burns, Mrs. Kirkpatrick, Mrs. Wardrobe, and Mrs. Glissan; the sisters, together with Christopher, being his next of kin.

At the time of Charles's death, although it was pretty

certain that he had left considerable property, its exact amount was not known, as this depended on the result of accounts between him and the representatives of his deceased partner. But whatever its amount might be, it was known to be subject to two annuities, one of 500*l.* in favour of his widow, and another of 60*l.* in favour of his sister, Mrs. Wardrobe.

Towards the latter end of the year 1798, Walter purchased, first from Mrs. Burns, and afterwards from Christopher, their respective interests in Charles's estate. And after a correspondence with his other sisters, which lasted until the year 1800, he finally purchased all their interests, and received from them, as he had done from Mrs. Burns and Christopher, an assignation and transference, duly executed. The deed from the three sisters contained the following recital:—"And further, "considering that the executory funds of the said Charles Irvine "in this country are very small, and unequal even to the dis- "charge of the funeral expenses and other debts due here; "And that the executory in the West Indies, though it may be "considerable, is extremely precarious, owing to different cir- "cumstances, such as the dangerous state of British settlements "in that quarter, particularly of Tobago, which before the "present war belonged to France, and that the discharge of the "burdens affecting it, and remittance of the clear remainder to "Great Britain, will be attended both with great delay and "danger as well as expense, and for these reasons the said "Walter Irvine, and we, the persons before-named, have come "to an agreement whereby he is to pay to each of us 2,250*l.* "sterling, and we are each of us to assign to him our several "shares and interests in said executory, for the purpose of "enabling him, the said Walter Irvine, to realize the same to "and for his own use and account alone. And seeing that the "said Walter Irvine has made payment to each of us the saids "Margaret, Eleonora, and Isabella Irvine, of the said sum of "2,250*l.*, as the agreed on value and consideration of our shares

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" of the said executory hereinafter conveyed, which belonged to " us severally as executors decerned and confirmed as aforesaid; " of which sums so paid to each of us, the receipt is hereby " acknowledged, renouncing all exceptions to the contrary;" and a clause of warrandice in these terms:—" Which assignation, " above written, we bind and oblige ourselves and our respec- " tive heirs, executors, and successors, to warrant from all facts " and deeds done or to be done by us in prejudice hereof; " declaring that this assignation and the shares of the said " executry or moveable estate hereby conveyed are and shall be " burdened with the due proportion of all the just and onerous " debts and deeds of the said Charles Irvine, and the warrandice " hereof shall not imply that the shares conveyed are equal to " or more than such legal burthens upon the said moveable " estate, but that the same is to be granted and accepted of by the " said Walter Irvine, under the chances of profit or loss which " may in the issue accrue therefrom, no such risk coming under " the said warrandice or affecting in any degree us or our " foresaids."

Either contemporaneously with this arrangement with the sisters, or shortly prior to it, the heir of Leith, who had been in partnership with Charles Irvine in Tobago, disputed an agreement which had been made in regard to the partnership debts and property, and instituted proceedings in the Courts of Tobago and of England, for having it set aside. These proceedings continued from their commencement in the year 1799 or 1800, until the year 1834, when they were terminated by a decision of Lord Brougham, then Lord Chancellor. This decision was followed by an amicable arrangement between the parties in January, 1834, based upon the Master's report in the suit.

In the meanwhile, both Walter Irvine and all his sisters had died off; Mrs. Glissan in 1814, Mrs. Wardrobe in 1821, Mrs. Kirkpatrick in 1823, Mrs. Burns in 1825, and Walter himself in 1824.

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The proceedings in Chancery having, as already mentioned, terminated in the year 1834, the Respondent, in the month of October, 1837, as executor-dative of Mrs. Kirkpatrick, and as residuary legatee of Mrs. Glissan and Mrs. Burns, brought an action against the Appellants, Lady Douglas and Miss Christian C. Irvine, as heirs, portioners, and executrixes of Walter Irvine. By this action he concluded for reduction of the assignation and transference by Mrs. Burns of her interest in Charles Irvine's estate in favour of Walter in 1798, and of the similar conveyance by Mrs. Wardrobe, Mrs. Kirkpatrick, and Mrs. Glissan in 1800. The reasons assigned for this conclusion were, *inter alia*, that the conveyances "were elicited and impetrated by the "said Walter Irvine, through gross fraud and circumvention on "his part, and through facility on the part of the granters, "without any onerous or just cause, and to their and the Pur- "suer's great hurt and lesion." "After allowing Walter Irvine "ample time for investigating and winding up his deceased "brother's affairs, his sisters repeatedly applied to him, the said "Walter Irvine, for the necessary explanation in regard to them, "and for an account of his actings and intromissions therewith; "but the said Walter Irvine not only refused or evaded to give "them a true, full, and accurate account or statement thereof, "but, on the contrary, in so far as he did not withhold expla- "nation altogether, made unfounded, false, and fraudulent repre- "sentations respecting the nature and extent of the said succes- "sion." "While the said Walter Irvine did thus fraudulently "mislead and deceive, and intimidate his sisters by these and "other false statements, as to the nature of the said succession, "its situation and extent, and their right and interest in it, and "withhold from them the full and particular knowledge of the "circumstances which he himself had; he at the same time "repeatedly urged and pressed upon his said sisters the accep- "tance of a liferent annuity and certain slump sums for their "share and interest in the said succession, always falsely stating

" that, in making such offers, he was going a great deal too far, " and was, in truth, sacrificing his own interest to theirs. That " his said sisters, the said Ann, Margaret, and Isabella Irvine, " in consequence of these fraudulent misrepresentations, their " ignorance of the true state of the facts, and of facility on their " part, were at last prevailed upon to accept certain sums in " full of their claims, as stated in the said deeds of assignation " before referred to and recited, and to convey to the said " Walter Irvine, by the said deeds, their right and interest in " the said succession, in consideration of the said sums, although " the said sums were greatly less, and were well known by the " said Walter Irvine to be greatly less, than what they were " entitled to from the said succession;—and which ultimately " yielded, as the said Walter Irvine all along knew it must yield, " a free residue for each of his said sisters, to the extent of not " less than 10,000*l.* sterling. *Quarto*, And independently of the " said fraudulent concealment and misrepresentation on the part " of the said Walter Irvine, it is at least certain that the whole " of the parties, and particularly his said sisters, were in gross " error, and ignorant of the real circumstances: His said " sisters had no means of knowing, except in so far as the said " Walter Irvine chose to give them information, the true extent " and amount of their brother's succession; and the said Walter " Irvine knowing, or having the means of knowing the same, " was responsible for the statements which he made, and on " which he prevailed upon them to act: Further, the said " assignation and others were obtained and granted without " value, or due and proper consideration; and the said Walter " Irvine undertook no obligation or risk corresponding to the " large funds and other advantages which he secured to himself " by virtue of the aforesaid deeds, mis-statements, and other " proceedings."

The Appellants stated several preliminary defences to this action, but without raising any objection to the Respondent's

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title. These defences were disposed of adversely to the Appellants. The Appellants then satisfied the production, and were afterwards ordered to give in defences upon the merits, which was duly done, and thereafter a record was made up by condescendence and answers.

In the condescendence put in by the Respondent, he made the following averments:—

Cond. 1. About the year 1766, Charles Irvine, the Pursuer's "maternal uncle, and John Leith, formerly of the island of "Tobago, purchased, on their joint account, certain lots of "ground to be cultivated as sugar plantations; and they after-"wards, in 1768, executed articles of copartnership in respect "of the land so purchased, by which it was agreed, that, after a "certain period, they should divide the lands equally between "them, each being subject to half of the debts and incum-"brances affecting the whole.

"*Cond.* 2. The two co-partners had subsequently occasion to "borrow considerable sums of money, which were secured by "way of mortgage over these planations in favour of the credi-"tors, Messrs. Ruckers, of London.

"*Cond.* 3. In 1778, the partnership between these parties "was dissolved; and, by deed of partition, the lands were "divided between them. The plantations called the Old and "New Grange, were conveyed in property to John Leith and "his heirs, and the plantation called Buccoo was conveyed in "property to Charles Irvine and his heirs. The parties agreed "to take an equal share of the existing debts; and, in respect "that the plantations of Old and New Grange were more "valuable by 10,400*l.* than Buccoo, John Leith became bound "to pay to Charles Irvine one moiety of that sum, or 5,200*l.*, "which was secured by mortgage in Irvine's favour over the "two former plantations.

"*Cond.* 4. John Leith died in 1788, intestate, and leaving

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"as his heir-at-law and sole nearest of kin, a lunatic sister, "Elizabeth Leith.

"*Cond.* 5. By reason of the foresaid mortgage of 5,200*l*., "and also of super-advances made by Charles Irvine to the "company creditors and mortgagees, Messrs. Ruckers, by which "the company debt was liquidated just about the time of "Charles Irvine's death, the said Charles Irvine became a "creditor, by way of mortgage, to the estate of John Leith, "secured over Old and New Grange, to a large amount. The "amount of this debt was settled in 1792 at between 17,000*l*. "and 18,000*l*. It had considerably increased between that "time and 11th April, 1798, when Charles Irvine died.

"*Cond.* 6. The amount of this mortgage debt, as in 1797, "was judicially stated on oath by his brother, Walter Irvine, "on or about 23rd July, 1801, in certain proceedings in the "Court of Chancery, to be 30,000*l*., or thereby; and, by the "final report by the Master of Chancery, it has subsequently "been ascertained that this debt amounted, 'as on the 31st "'day of December, 1797, to the sum of 22,841*l*. 11*s*. 3*d*. "'sterling, with interest at 6 per cent. on 20,157*l*. 15*s*. 3*d*. "'thereof of principal, from the said 31st December, 1797, till "'the death of the said Charles Irvine, on the 11th day of "'April, 1798.'

"*Cond.* 7. The said Walter Irvine, as having or pretending "right to the said mortgage debt, was found by the said Master "to have received payment of the whole of this debt, both "principal and interest, out of the estates of the said John "Leith, being the produce of the Old and New Grange Planta- "tions prior to 1819.

"*Cond.* 8. On the death of Charles Irvine, in April, 1798, "intestate, his heir-at-law was his brother, the late Walter "Irvine; and his nearest of kin were his younger brother, "Christopher William Irvine, and his four sisters, Isobel,

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" Margaret, Anne, and Eleonora. He left a widow, who had " renounced her legal provisions in consideration of an annuity " of 500*l.* per annum stipulated to be paid to her. The said " Charles Irvine died, domiciled in Scotland.

" *Cond.* 9. By the law of Tobago, the said mortgage debt, " amounting to upwards of 23,000*l.*, constituted part of Charles " Irvine's personal estate, which descended to his nearest in kin. " Besides this, the residue of his personal succession (exclusive " of his real estate, which descended to his heir-at-law), was very " large. It was stated by Walter Irvine himself, in a memo- " randum or estimate, which his agent, by his desire, laid before " his sisters, with a view to the transaction after-mentioned, at " between 13,000*l.* and 14,000*l.* But the real amount very " greatly exceeded that sum.

" *Cond.* 10. The said Walter Irvine being desirous of obtain- " ing for himself the whole benefit of this large succession, to " the loss, and in fraud of his sisters after-mentioned, entered " into a negotiation with them, the result of which was, that " he, by fraud and misrepresentation, induced his three sisters, " Isobel (Mrs. Kirkpatrick), Margaret, and Anne (Mrs. Burn), " to give over and assign to him, for a very inadequate consi- " deration, their shares of the personal succession of their " brother Charles.

" *Cond.* 11. In prosecuting this fraudulent scheme, Walter " Irvine first made a secret settlement with his younger brother, " Christopher William, who had been for many years resident " in Tobago, had managed the estates and affairs of Charles " in that island, and was thus cognizant of the extent " and details of his succession. Christopher William was in " Tobago at the time Charles died; but he came to Great " Britain in the course of that summer.

" *Cond.* 12. In the course of the private negotiation between " the two brothers, which terminated in the younger brother " assigning to the elder his share of Charles's personal succes-

" sion, that share was estimated by Christopher William at " 6,000*l.* or 7,000*l.* sterling.

" *Cond.* 13. Christopher William was at that time debtor to " Walter in a large sum, the amount of which the brothers " were not agreed upon, but which must (as appears from what " follows) have been ultimately estimated in the compromise at " near 5,000*l.* or 6,000*l.*

" *Cond.* 14. Christopher William, at first proposed to assign " his share of the personal succession to Walter in security of " his debt; but Walter's object being to obtain an abso- " lute right to the share, it was ultimately arranged that, in " consideration of an absolute assignation being granted by " Christopher William, Walter should grant him a full dis- " charge of his debt, and also pay him over and above 1200*l.* " The transaction was completed by the execution of an assign- " ment and release, dated 1st November, 1798.

" *Cond.* 15. The assignment sets forth, 'and whereas the " ' said Christopher William Irvine stands indebted to the said " ' Walter Irvine, who is next eldest brother and heir-at-law " ' to the said Charles Irvine, in a considerable sum of money, " ' and the said Walter Irvine has also paid to the said Chris- " ' topher William Irvine the sum of twelve hundred pounds " ' sterling money of Great Britain.' Christopher William " Irvine then proceeds to assign his share of the personal suc- " cession, 'and the said Walter Irvine doth hereby, in consi- " ' deration of this present assignment, acquit, release, and " ' discharge the said Christopher William Irvine, his executors, " ' administrators, and assigns, of and from all debts, sum and " ' sums of money, now due to the said Walter Irvine by the " ' said Christopher William Irvine, in any manner whatsoever, " ' and every part and parcel of the same.'

" *Cond.* 16. At the time when Walter Irvine agreed " to this transaction, he also insisted upon bestowing upon " Christopher William, as a condition of his acceptance, an

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" additional document in the shape of a bond of annuity, to be " executed by Walter in favour of Christopher, of 300*l.* during " his life, to be continued after his death in the proportion of " 100*l.* to his widow, and 200*l.* in equal moieties, to his children " during their lives.

" *Cond.* 17. It was well understood and arranged between " the brothers, that the true nature of this settlement between " them should be concealed from their sisters, and that Chris- " topher William should do all that he could to aid Walter in " his attempts to make a very different settlement with them; " and the two brothers acted upon this arrangement. Chris- " topher William aided his brother in misrepresenting the " nature of the settlement between them, and advised his " sisters to trust themselves in Walter's hands, and to confide " in his generosity.

" *Cond.* 18. Walter Irvine, in negotiating with his sisters, " employed Mr. Charles Steuart, writer in Edinburgh, as his " agent, as being a person in whom these sisters had great con- " fidence; but he concealed even from Mr. Steuart the particulars " of his settlement with his brother Christopher, giving him to " understand that Christopher had acted in the most liberal and " handsome manner, and had offered his share of the personal " succession, at once, upon his (Walter's) own terms.

" *Cond.* 19. The first of his sisters with whom Walter Irvine " effected a settlement was Mrs. Burn, who had married a clergy- " man. These people appear to have placed implicit confidence " in Walter Irvine, and his agent, Mr. Steuart. Mrs. Burn " having applied to Mr. Steuart for information as to the per- " sonal succession, Mr. Steuart, on the 6th of June, 1798, " wrote to her a letter, in which he represented it as uncertain " whether the personal estate would be equal to pay the debts " affecting it. This appears to have been the only information " furnished to these simple-hearted people before they agreed " to assign over their rights to Walter Irvine.

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"*Cond.* 20. Mr. and Mrs. Burn wrote to Walter Irvine "declaring they would do anything he pleased in regard to the "executry of their late brother Charles. Walter proposed that "they should assign their interest in the executry, upon the "condition of his granting them an annuity of 100*l.* upon their "joint lives. This offer was thankfully accepted by Mr. and "Mrs. Burn on the 6th of November, 1798, who seemed to "think this a most generous offer on the part of Walter; and "on these terms an assignation was finally executed by Mr. and "Mrs. Burn on the 25th of December, 1798.

"*Cond.* 21. At the time this transaction took place Mr. and "Mrs. Burn were far advanced in life, and were both of them in "bad health. The annuity, stipulated as the price of their "assignment of their share, was utterly inadequate, and they "never would have agreed to this transaction, had they known "the terms upon which the previous settlement between Walter "and his brother Christopher had been arranged.

"*Cond.* 22. The negotiation between Walter and his two "sisters, Isabella (Mrs. Kirkpatrick) and Margaret for a trans-"ference of their shares of the personal succession, was much "more protracted. He made several unsuccessful attempts "before he at length succeeded in persuading them to make "over their claims to him.

"*Cond.* 23. Previous to 26th April, 1798, Walter Irvine had "received an opinion from Mr. Pigot, an eminent lawyer in "London, whom he had consulted as to his legal interest in his "brother Charles's succession, in which Mr. Pigot advised him "that the personal property descended to the nearest of kin, "brothers and sisters. Miss Margaret Irvine had applied to "Walter for some information as to Charles's succession, in "which she and her sisters thought they must have an interest, "and requested leave to wait on her brother respecting this "business; Walter, on the 27th of April, returned the following "answer:

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" ' Mr. Irvine begs leave to acquaint Miss Irvine, that all " ' persons who had claims on the estate of the late Charles " ' Irvine were, by public advertisement, directed to lodge them " ' with Mr. Charles Steuart, W.S., which he deemed sufficient " ' notification; but, for her more immediate satisfaction, he " ' begs leave to transmit a paragraph of an opinion he only " ' received yesterday from an eminent solicitor in London:— ' " The whole of the real estate descends to the heir-at-law, ' " who is his next eldest brother, if he died without issue, and ' " no will, and the personal estate equally divided amongst his ' " brothers."—J. does not vouch for this opinion being the law,— " ' those who think themselves aggrieved may have their recourse " ' how they may. In the mean time J. does not consider himself " ' answerable in any shape, farther than to secure his own " ' rights. Mr. Irvine is very sorry to inform Miss Irvine he " ' cannot possibly enter into any personal discussion on this " ' subject, or indeed any other. Mr. Steuart will, however, be " ' ready, as his man of business, to attend to her.'

" The opinion from which the foregoing excerpt was taken " was that of a Mr. Brown, solicitor in London, which had " been transmitted to Walter by his correspondents, Messrs. " Ruckers. The apparent contradiction between it and that of " Mr. Pigot arose from this circumstance, that Mr. Brown did " not know that Charles Irvine had left any sisters. Of this " circumstance Walter was aware, and on 28th April he wrote " to Messrs. Ruckers, mentioning the difference between the " two opinions, and desiring them to inform Mr. Brown of the " existence of the four sisters. Yet, in writing to his sister " Margaret, he quoted the opinion of the solicitor founded upon " imperfect information, and withheld the contrary opinion of " the barrister whom he himself had consulted.

" *Cond.* 24. Of this date, Walter wrote to his agent, Mr. " Steuart, stating, that his sisters were dreadfully in want, and " had become very clamorous in consequence of their expecta-

" tions from their brother's estate. He desired him to advance " them 30*l.* in the meantime : and after disclosing his intention " of giving them a consideration for their shares in the personal " succession, he instructed him to offer them each 500*l.* recom- " mending it as from himself.

" *Cond.* 25. In the month of July following, Walter Irvine, " through his agent, Mr. Steuart, laid before his sisters a " memorial and estimate of their late brother's personal succes- " sion, presenting a very unfavourable view of it, and bringing " out a balance of 4,733*l.* against the executor. This, however, " did not include the mortgage debt, the amount of which he " did not communicate, and on the 31st of July he again " instructed Mr. Steuart to offer them 500*l.* or 600*l.* a-piece for " their claims.

" *Cond.* 26. On the 14th of January, 1799, Walter Irvine " instructed Mr. Steuart to offer to each of his sisters, for their " shares of the personal succession, an annuity of 50*l.* during " their lives, and 500*l.* sterling down.

" *Cond.* 27. Mr. Steuart having reported that his sisters " were disinclined to accept of this offer, and wished to see a " distinct state of the affairs, Walter Irvine on the 30th of " January, instructed him to offer them 1000*l.* paid down, and " he gave him power to increase his offer to the extent of " 200*l.* or 300*l.* more each.

" *Cond.* 28. These offers having not been accepted, Walter " Irvine, on the 29th of January, 1800, wrote a letter to his " sisters, Mrs. Kirkpatrick and Miss Irvine, in which he thus " mentions the settlement he had made with his sister Mrs. " Burn, and his brother Christopher:—' I think it neces- " ' sary to inform you the settlement I made with Mrs. Burn " ' stands thus—100*l.* a-year annuity to be paid on the joint " ' lives of her and her husband, in lieu of her rights. To our " ' brother Christopher I paid 1,200*l.* twelve months after he " ' had made the assignment. As for Mrs. Wardrobe whom

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" ' you suppose I am disposed to befriend, you will be surprised " ' to hear from me I have never paid a farthing, &c. In " ' respect to Christopher accepting of what you may think a " ' small compensation, I can assure you it was his own act and " ' deed. I never made any proposal of the kind to him; on " ' the contrary, I had thought of making over to him all my " ' rights in the personal estate, in order to get rid of the " ' trouble I knew I should have with it, but this he declined, " ' for the same reason, and the impossibility, as heir-at-law, " ' that I should shake myself clear of it whilst so circumstanced " ' with the lunatic's estate. All of which affairs he, from his " ' professional knowledge, was a much better judge of than I " ' could possibly be. We will suppose the Grange debt still " ' to be from 15,000*l.* to 20,000*l.*, call it 18,000*l.*

" *Cond.* 29. In this letter Walter Irvine made a grossly " false and fraudulent statement with regard to the consideration " which he had allowed to his brother Christopher for the " assignment of his share of the personal executry, as also in " regard to the probable amount of the Grange debt. Instead " of 1,200*l.*, he had allowed to his brother 6,000*l.* or 7,000*l.*; " and in regard to the Grange debt, instead of 18,000*l.*, it was " estimated by Walter Irvine himself, judicially on oath, within " eighteen months of the time when he wrote this letter, at " 30,000*l.* His sisters, however, were materially influenced by " these false and fraudulent statements, and, being in great " poverty, they believed that the best course for them was to " accept his offer, which he now had considerably increased.

" *Cond.* 30. In negotiating with his sisters, Isobel (Mrs. " Kirkpatrick) and Margaret, Walter Irvine did not deal with " any legal advisers of these ladies. On the part of these ladies " the negotiation was conducted, and the terms of the compro- " mise with Walter Irvine settled, by a Dr. Mulvey, a person " utterly unacquainted with business, and whose conduct was " guided or approved of by no legal adviser of these ladies " Walter Irvine's views in these transactions were also materially

" forwarded by a Mr. Lindsay, who pretended to the character " of a mutual friend of the parties.

" *Cond.* 31. The final settlement as to these two sisters was " made in London, on or about Wednesday, the 2nd of April, " 1800, at an interview between Walter Irvine on the one hand, " and Dr. Mulvey on the other. No legal adviser was present " on the part of the ladies, but the doctor acted as their sole " and accredited agent. The terms of compromise then settled " were afterwards embodied in the assignations granted by these " two ladies now under reduction.

" *Cond.* 32. By these assignations, Mrs. Kirkpatrick and " Margaret Irvine, in consideration of the sum of 2,250*l.* " sterling, payable to each of them, assigned and transferred to " the said Walter Irvine their shares and interest in the move- " able succession of their brother, the said Charles Irvine."

The plea in law on which the Respondent relied, was as follows:—" In respect of the gross fraud, misrepresentation, " and undue concealment of the said deceased Walter Irvine, " in negotiating with his sisters, and the circumvention which " he practised on them in regard to the compromise of their " rights, the deeds called for in the summons, by which that " compromise was carried into effect, ought to be reduced, and " the Pursuer restored against the effect of them."

The Appellants pleaded in answer,—" 1. The general state- " ments in the libel and condescendence are irrelevant, and " insufficient to support all or any of the reasons of reduction. " 2. At least, the Pursuer's averments being all false and " groundless in themselves, and the deed challenged having been " granted without fraud, misrepresentation, undue concealment, " or circumvention, the action ought to be dismissed."

The Lord Ordinary, after hearing parties on the relevancy of the averments, remitted the case to the issue clerks, by whom the following issue was prepared:—" It being admitted " that the assignation, of which No. 54 of process is an extract, " dated the 25th of December, 1798, was executed by the

" deceased Mrs. Anne Irvine, with the special advice and " consent of her husband, the late Rev. John Burn, in favour of " her brother, the deceased Walter Irvine:

" It being also admitted that the assignation, of which No. " 55 of process is an extract, dated the 5th and 6th days of " May, and 26th day of June, 1800, was executed by the late " Margaret Irvine, and by the late Mrs. Isabella Irvine, other- " wise Kirkpatrick, in favour of their brother, the said deceased " Walter Irvine:

" I. Whether the said assignation, of which No. 54 of " process is an extract, was procured by fraudulent misrepre- " sentation, or fraudulent concealment on the part of the said " Walter Irvine?

" II. Whether the said assignation, of which No. 55 of " process is an extract, was procured by fraudulent misrepre- " sentation, or fraudulent concealment, on the part of the said " Walter Irvine?"

The Respondents objected both to the form of this issue, and to the proposed mode of trying the case by a jury. But these objections were overruled; leave to appeal the interlocutor overruling the objections was then asked, but refused, and the cause went to trial, when a general verdict was returned for the Respondent. The Court refused a motion to set aside the verdict, and grant a new trial, and on the 21st January, 1848, pronounced the following interlocutor:—" In respect of the verdict of the jury in this " case, decern in terms of the reductive conclusion of the " summons, and remit the cause to the Lord Ordinary, to hear " parties on the conclusion for count and reckoning, and other " conclusions not now disposed of, and to proceed further " as to his Lordship shall seem just."

The appeal was taken against the different interlocutors of the Lord Ordinary and of the Court.

Sir F. Kelly, *Mr. Bethell*, and *Mr. Anderson*, for the Appellants.

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I. The title of the Respondent, stated in his summons, is not such as can entitle him to the prayer of it in any view, for the summons shows he is claiming the interests of women who were all of them married, whose husbands therefore, or their representatives, would be entitled to that which the Respondent asks by the action. Further the summons asks for reduction of the deed to which Mrs. Wardrobe was a party, but no representation is shown by the Respondent to that lady, of one kind or another, not even the faulty representation which he sets up to the other sisters.

[*Lord Brougham.*—Was this objection taken in the Court below?]

No, it was not, but on the authority of Burnes *v.* Pennel, 6 *Bell's Ap. Ca.* 541, and Luke *v.* Magistrates of Edinburgh, 6 *Wils.* and *Sh.* 241, that circumstance will not form an obstacle to its being now urged.

II. Upon the Respondent's own showing, both by his summons and his condescendence, there was no case either of fraudulent representation or of fraudulent concealment. If it be kept in mind that provision had to be made out of Charles's estate for the annuities to his widow, and to Mrs. Wardrobe, it will be evident that after paying the price of the purchase of his brother and sister's interests there could remain very little for Walter himself, unless what he might expect from the issue of the proceedings with the heir of Leith. Walter then had given the parties whom the Respondent represents, more than their share of the available fund, and had, by his purchase, only achieved making himself heir to a Chancery suit, which in the result, did not belie the character of such proceedings, for it lasted during 34 years, and outlived all those persons who are now represented as having been injured by being cajoled into not abiding its result. No doubt that result was favourable, but it might have been otherwise, and the prospect of the long delay and this uncertainty might well make it a

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prudent step for the sisters, who were in poverty at the time, to sell the chance of something good for the instant possession of a reasonable price. This is the view which, upon the Respondent's own showing of the nature of the transaction, every prudent mind would take, laying aside for the time any question as to misrepresentation or concealment.

And first, as to misrepresentation, there is no *fact* connected with Charles's estate which Walter in any way misrepresented; every fact now relied on was brought before the sisters, so as either to give them a full knowledge, or put in their power to acquire such a knowledge of it—the only circumstance as to which the Record makes even a suggestion of misrepresentation is the Tobago mortgage debt, but the memorial which accompanied the estimate sent by Walter to his sisters negatives any such suggestion,—that debt was there distinctly mentioned. It is spoken of, certainly, as belonging to *the heir*, a misrepresentation of the law, as innocently made, perhaps, as it was innocently received; but either way that was not such a fact as the parties were entitled to ask from Walter, still less were they entitled to rely upon his statement of it. He was no agent or adviser of theirs. On the contrary, by the Respondent's own showing, he was dealing with them at arm's length, and in his letters distinctly put them upon enquiring for themselves.

Second, as to concealment, there is nothing in the Record to which this charge has the semblance of application but the purchase of Christopher's interest. In the letter of the 20th January, 1800, Walter says he had paid Christopher 1200*l.*, and now the Respondent alleges that he also paid him the release of an old debt, stated to have been between 6000*l.* and 7000*l.*, and that he also "insisted upon bestowing upon" him an annuity for himself, his widow, and children. Assuming these statements to be true, the sisters had no right to a knowledge of them. It was *jus tertii* to them what arrange-

ment was come to by Walter and Christopher with each other. If they had no right to a knowledge of these facts, then they could not complain of their concealment.

The averments in the condescendence are not only that there was misrepresentation and concealment, but that the representation and the concealment were *fraudulent*, and fraud is the designation given to everything that was done. It is not sufficient, however, to justify an issue of fraud or no fraud that the party uses that term.

In strict pleading, the party must show, not only that the representations made to him were false, and that the maker knew them to be false, but that he was induced, through the falsehood, to enter into the transaction which the falsehood was intended to draw after it. He must not only *aver* fraud, but something that *shows* fraud, although that term had not been used to characterize it. He must prove it, as averred Wilde *v.* Gibson, 1 *Ho. of Lords, Ca.* 625.

On this Record there is no averment of substantive fraud, or anything to which, by the utmost ingenuity, that character can be ascribed. But not only should fraud have been shown by the averments, but fraud going to the substance of the transaction sought to be disturbed. Fraud may have influenced the inducing motive, but that won't avail; it must enter into the very substance of the act done, *Stair* I. 17, 2.

There was nothing, then, upon the Record, which entitled the Respondent to the issues which he obtained, and the interlocutor approving of them ought now to be reversed.

III. But further, the claim set up by the Respondent is that which is known in English law language as "a stale "demand," and is equally discountenanced by the law of Scotland as it is by the law of England. The parties whom the Respondent represents, stood by, so long as they lived, and he has done so since their death, enjoying all the benefits of the arrangement made with Walter, slumbering upon their

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supposed objections, not in ignorance of them, but in attendance on the result of the proceedings in Chancery, until it should be seen whether there would be advantage in bringing the objections forward, and then doing so after a lapse of nearly 40 years. Such conduct has always been viewed by the Courts of both countries, as disentitling the party to their aid in recovering rights, which he has shown himself so negligent of. Smith *v.* Clay, *Amb.* 645; Cholmondeley *v.* Clinton, 2 *Jac. & W.* 1; Champion *v.* Rigby, 1 *Russ. & My.* 539; Roberts *v.* Tunstall, 4 *Hare*, 257; 2 *Bell's Prin.* 115; Monkland Coy. *v.* Dickson, 5 *Wil. & Sh.* 447. The mere lapse of time, therefore, formed such a personal exception against the Respondent as should have barred his being heard.

The Lord Advocate and *Mr. J. Parker* for Respondent. I. and III. It is too late now for the Appellants to raise any objection as to title or lapse of time; every question of that nature was open to them before satisfying the production. The deeds once produced, all that remains is to examine the grounds of the challenge, and the door is closed against all objections to title, or of other preliminary nature. By the provisions of the 6th Geo. IV, c. 120, s. 5, preliminary or dilatory defences, as they are called, are to be pleaded and disposed of before defences on the merits are to be ordered. This assumes that, after the defences on the merits, dilatory defences are not to be entertained. At all events the 10th section of the same statute, after providing for the final adjustment of the Record, "enacts that "no amendment of the libel, or *new ground of* "*defence* shall be allowed after the Record shall have been "thus completed." If, therefore, the Appellants wished to found on these objections of want of title, or lapse of time, they should have pleaded them before satisfying the production.

[*Lord Brougham.*—Do you hold the defence as to time to be barred if not reserved?]

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Decidedly.

[*Lord Brougham.*—That is if pleaded as a bar, not as showing a stale demand.]

Both, certainly.

[*Lord Brougham.*—It is not so in England.]

The heads of acquiescence and homologation give the doctrine of stale demand, though that term is not known in the law language of Scotland. They are constantly pleaded, and an issue on the subject of acquiescence would have been granted had it been asked.

[*Lord Brougham.*—My question did not go the length of homologation or acquiescence, but regarded time as a mere topic.]

Our argument goes that length too; for it comes to this, that if time had been pleaded, it would have precluded the necessity of going into the grounds of reduction, but it must be pleaded as a preliminary defence in some shape, otherwise it is barred. In Monkland Coy. *v.* Dickson, homologation and acquiescence had been both pleaded, and the plea had been sustained. Here, from the course taken by the Appellants, there was nothing to induce the Court or the Respondent to suppose that anything was to be gone into but the grounds of reduction; accordingly the issues were so framed as to meet these alone, and the evidence took the same course.

II. The cause having been tried by a jury, it is not competent to complain of that mode of enquiry having been adopted; the remit for trial by jury cannot be appealed against; 59 Geo. III. cap. 35, sec. 15. If then the case has been duly tried, the Appellants cannot have it re-tried here; the charge of fraud may be very absurd, but a jury have decided otherwise, and so has the Court below when asked to disturb the verdict by ordering a new trial. All that can be argued here, is the relevancy of the averments, without regard to the evidence by which they may be supported. The averments of the summons are suffi-

ciently broad to support the case set up by the Respondent, and the statements of the condescendence are equally so. They show that, after having been made aware, by the opinion of Mr. Pigot, that the personalty of Charles descended to his sisters as well as his brothers, and that the West India mortgage formed part of his personalty, Walter concealed this information, and dealt with his sisters on the representation that the personalty went to the brothers alone, and the mortgage formed part of the realty, and went to himself alone, as Charles's heir, and that the effect of this was at once to wipe off 31,000*l.* from the executry. These averments might be false, but assuming them to be true, they were undoubtedly relevant to support the charge of fraud. They show the case of a trustee dealing with his *cestui que* trusts, without communicating to them all the knowledge which he himself possessed, for as Walter was not entitled to the mortgage debts or the other personalty, his interference with either placed him in the position of an executor *de son tort*, and made him, as such, liable to all the obligations thrown upon a trustee for the protection of his *cestui que* trusts. His acts, therefore, are to be looked upon with a jealousy, and in a manner different from that in which the acts of an ordinary person would be viewed.

LORD BROUGHAM.—This case brings before your Lordships for decision the merits of an interlocutor of the Court of Session in Scotland reducing two Deeds of Assignment, or, as it is called in Scotland, Assignation, one made in 1798 and the other in 1800, between two parties, one of whom is Walter Irvine, the father of the present Appellant Lady William Douglas, and the others of whom are the four sisters of Walter Irvine, Mrs. Burn, Miss Irvine, Mrs. Wardrobe, and Mrs. Kirkpatrick, formerly the Misses Irvine, and their representatives; and it is painful in the very outset of my observation to remark, that we are here deciding upon the validity of two

deeds made by and in favour of parties, none of whom are now alive, their interests being only represented by their heirs and representatives, for the parties themselves have long since gone to their graves. The last of them died in 1829, others of them in 1824, 1825, or 1826, I think, and the first observation which I have to make to your Lordshps will rest upon that circumstance.

My Lords, the deeds were sought to be reduced by proceedings commenced at periods of 37 and 39 years respectively from the dates of those instruments. Those two Assignations consisted of a family arrangement (upon which I shall say a word presently), between Walter Irvine the brother, he and Christopher being the survivors of three brothers, Charles being dead, and his four sisters, (three of whom were then unmarried, the Misses Irvine), of whom Mrs. Burn was one, Miss Irvine another, Mrs. Wardrobe the third, and Mrs. Kirkpatrick the fourth. My Lords, a large estate in Tobago had belonged to one of the brothers, Charles Irvine, who died long before the commencement of the suit, a considerable time before the execution of the second and a little while before the execution of the first of these deeds. He died in 1798, and questions of a complicated nature arose immediately after his decease respecting the succession to his property, for there were mortgages upon it to a considerable amount, with other claims. There was a lunatic, a Miss Leith, who had interests, or a claim, as it is called, on the estate, and there was Walter Irvine, the heir-at-law to the real estate, and who by the law of Tobago, if Charles was understood to be there domiciled, had a claim also to a share of the personalty. There was likewise Christopher, who had a claim past all doubt to his share, being the agent of the estate, living in the island, and I believe domiciled there, though this is immaterial. Charles Irvine, the deceased, to whom Walter succeeded as heir-at-law, was domiciled, as it appears, though that is not admitted, but he rather appears to

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have been for six years, namely, from 1792 to 1798, resident in Scotland, being a native of that country, whither he had returned from Tobago, and where, without ever returning to Tobago, he died.

At the late period to which I have alluded, namely, 37 years after the last of the deeds, and 39 years after the first had been executed, proceedings were commenced in the Courts of Scotland; and out of these the judgment arose which is the subject of our present consideration. An action of reduction was brought of these two deeds, upon the ground of misrepresentation by Walter to his sisters, the Misses Irvine, or of fraudulent concealment of facts within his knowledge from their knowledge, or of both fraudulent misrepresentation and fraudulent concealment, which past all doubt, if sufficiently averred on the pleadings, and if sufficiently proved in evidence, would have sufficiently called upon the Court to reduce or set aside the deeds.

The object of this arrangement was, on the part of Walter, to obtain from his sisters the surrender of all right to their share of the personalty of Charles their deceased brother; and the question, and the only question raised by the action was, whether, in order to obtain this benefit for himself, he fraudulently misrepresented or fraudulently concealed matters to induce his sisters to enter into that arrangement, and whether such misrepresentation or concealment, or both, operating upon them, induced them to execute the deeds in question? And here I must stop to remove out of the cause that which has not been dwelt upon except as a topic in argument occasionally, but which I consider in the circumstances of the case to have little or no place, namely, that this is in the nature of a family arrangement, for I conceive that a family arrangement between parties who were treating really at arm's length, who were not upon good terms with each other (at least two of the sisters, as they state, were not upon good terms with their brother

Walter), has little or no place, and above all where fraud is alleged. That matter, therefore, I at once throw out of the cause.

But my Lords, I now come to a consideration of the manner in which the Court dealt with the case upon the pleadings. It appeared to their Lordships after argument, that there was sufficient ground for directing an issue and sending the question of fraud to be tried by a jury. From that decision no appeal lies, any more than from the decision on the motion for a new trial which was subsequently made and refused. Therefore we have nothing judicially to do with that. Nevertheless it is difficult for me in considering this case, and casting my eye back upon the course of the discussion on either side at the bar; it is difficult for me, so regarding what has passed here, and regarding the evidence, the mass of which I now have under my hand, to avoid saying one word to express my regret that such a course was taken, for here are between nine and ten hundred closely printed quarto pages of correspondence submitted to a jury, who, through that maze, were to grope their way, who, by examining the pieces whereof that mass consisted, were to make up their minds, and who, as the result of that painful and hardly practicable examination, that laborious and hardly possible enquiry, were to give their opinion upon the matter of fact submitted to their consideration by the issues sent them to try. I had much rather that the opinion of the Court itself had been taken upon the subject than that it should have been sent to be tried by a Jury. It is, however, now too late to wish for that which did not take place. Nor is that which we are now considering, how the Court thought fit to deal with the case, first in ordering the trial, and next on the motion for a new trial. With neither of these questions have your Lordships now anything to do; we are confined to the judgment finally pronounced setting the deeds aside.

And first I must advert to the time which has elapsed. It may, however, be more convenient that I should commence

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with what I have to offer upon the frame of the issues and upon the form of the record. There were two deeds, numbered 54 and 55, in the process, or as I see they are called Nos. 57 and 58 in my copy of the pleadings, Mrs. Burn's deed, and Miss Irvine's, Mrs. Wardrobe's, and Mrs. Kirkpatrick's deed respectively. These deeds were the subject-matter of the two issues which are conceived in the same terms, the question sent to the jury being whether Walter Irvine did obtain (it is not even said "did or did not," so as to make it grammatical), the deeds in question, by fraudulent misrepresentation or fraudulent concealment from his sisters? Beyond all manner of doubt this is an improper form of issue. It is improper for more reasons than one, each of which would be enough to support its condemnation. It is improper to couple together two not necessarily connected or even dependent issues. It is highly improper, illogical, and in every respect mischievous to put a question on two separate matters, to one of which an affirmative answer might be returned, and to the other a negative. It is asking a jury to answer a double question, to one parcel of which they might say "yea," and to another "nay," contrary to every rule either of examining a witness, or of interrogating a jury. But it is improper on another account, and most essentially, and for paramount reasons improper, when you consider that you are not asking the question, as in the case of a witness, of one individual, but of twelve, six of whom might say that the deed was obtained by fraudulent misrepresentation, and the other six that it was obtained by fraudulent concealment. They all together, the whole twelve, might join in giving that verdict, which alone they gave for the Pursuer, making no distinction, effecting no separation, referring to no diversity between the two matters, but a general verdict against the deed, not even answering the question put, not even saying that it was fraudulently obtained, and without saying in what way, but a general verdict for the Pursuer, leaving the Court to gather, (and I believe this

is not inconsistent with the loose and slovenly practice of that Court), that it was meant to answer the question put to the jury in the affirmative generally. How then can we say that we have a verdict at all upon such an issue sent to a jury, and such a general verdict returned! I have no security. I cannot tell. I do not mean to say that the fault of the issue might not have been cured by the verdict of the jury. I do not mean to say that if the jury had returned a verdict in answer to the compound question separating it into its parts, they might not have got rid of the evil of its duplicity, for they might have said if they had chosen, "we specially find" so and so. Then it must have been unanimous, and that would have taken away all the risk of there being no verdict at all; which exists in the present case. They might have said "we find that there was fraudulent misrepresentation, and that the deed was obtained by "that, but we do not find that there was fraudulent concealment," or they might have said, "there was fraudulent concealment, "but we do not say there was fraudulent misrepresentation," or they might have said, "there was both fraudulent misrepresentation and fraudulent concealment," or they might have said "there was neither." Therefore they might, by a special finding, have cured the radical defect of the question put to them. And why, let me ask, did the most able and learned Judge who tried the cause, not give his direction to the jury so to find? If he had done so, I am far from meaning to say that he would have taken away all difficulty in the present case, but at least he would have taken away from the Court below, and from your Lordships' dealing with what was done in the Court below, the first of the great difficulties which meets us and obstructs our progress in endeavouring to see our way through this case. He did not so think fit to do, and a general verdict was thus returned. A motion for a new trial was made, it was refused, and that could not be appealed from. Judgment was then passed for the Pursuer according to the verdict, as the Court

deemed it and construed it; that judgment was to reduce the deeds, and that is the judgment now under appeal. It is a judgment proceeding upon the supposition that the jury were all agreed in their finding; whereas from the form of the issue compared with the nature of the verdict, it is quite probable that half the jury might have found one thing and half another; and that they agreed in nothing at all.

My Lords, the next observation which I have to make is perhaps yet more material with a view to the ultimate decision of the cause. The verdict being general, not finding whether it was misrepresentation or concealment, or both, but only negativing that it was neither (we are left only with the information that it was for one or other of those reasons, or both, but we cannot tell which, that the jury found for the Pursuer), then what position do we now find ourselves in, and what position were the Court below in, though they do not seem to have been aware of it? Notwithstanding the trial ordered; notwithstanding the trial had; notwithstanding the verdict pronounced; and notwithstanding the refusal to have a new investigation—no valid judgment could pass upon this record, unless there was in the record enough to support the judgment. The verdict is only auxiliary to the working out, as it were, of the purpose of the record. Then we are referred to the summons, and the condescendence, and whatever else, on the part of the Pursuer, is said to be his recorded statement of his own case. Well, but suppose this, which is possible; which might have happened in this case, and may happen in any other case of the same sort, where the double and confused mode of framing issues is adopted; suppose one of the two matters were well and validly alleged upon the record, so that if the finding had been upon this matter there would have been no doubt of the judgment to be passed upon it; suppose the other matter were so set forth upon the record, that if a verdict had passed upon it, no judgment could validly have been supported by that finding.

Here is the position we are in. I will suppose misrepresentation to have been duly alleged, and with sufficient specification; I will suppose concealment to have been not duly alleged, and without sufficient specification—or, which comes to the same thing, that it was concealment of that which the party had no obligation of any sort, either in law or in equity, to reveal—and suppose the jury had found upon the misrepresentation in the affirmative,—judgment, beyond all doubt, would have passed upon that finding. But then suppose they had found only upon the second, which was ill set forth, it is equally clear that no judgment could have passed validly upon it. Well, then where are we? We have a general verdict; and we cannot say whether it was upon the misrepresentation, which, if the finding had been upon that, would have supported the judgment, or was only upon the concealment, which, by the hypothesis I am making, would not have supported the judgment. Then how is the Court validly or safely to pronounce a judgment on such an equivocal and inept verdict? It is contended by the Appellants that in that case the only competent judgment would be an absolvitor—a judgment to assoilzie from the conclusions of the summons the Defenders called into Court upon such a record, and charged only upon such a verdict.

I have considered this point with great attention, and I have been referred to a number of cases to show that this is the common mode of pleading in Scotland. But upon looking into these cases, which I have attentively considered, one difficulty occurred to me in all of them. For aught I know, the difficulty was cured in the mode which I have described as that which might have been adopted here, namely, by the jury finding specially. I cannot tell, and I have asked in vain for a copy of any book in which any of those cases could be traced. Mr. Lefevre was kind enough to look this morning, at my desire, after I had read the cases sent to me yesterday morning, and he can find no book whatever in which we see the result of the

trials. At all events, those cases, (putting that circumstance entirely aside,) were given to me with another view—not with a view to their ultimate effect, but to show that here the ordinary course of pleading had been pursued; and this, I think, is sufficiently proved. I think, however, it is *mala praxis*. I hope and trust that it is a course which will be no longer followed; and I take leave most respectfully but most earnestly to press upon the attention of their Lordships in the Court below the propriety of turning over a new leaf, and adopting a more sensible, rational, and logical practice. That must be a bad course of proceeding which cannot be prevented from working confusion and begetting error, by the accident of a jury finding specially when no power exists of preventing them from finding a general verdict.

I should have been in great difficulty indeed upon this subject, if I had been of opinion that misrepresentation was validly set forth, and concealment not competently set forth; or that misrepresentation was incompetently set forth, and that concealment was validly set forth. I should have been, upon the shape of this record, in a painful predicament. I should then have had to go into the learning of those cases which were so much discussed here some six years ago; I mean that of the Irish Writ of Error, in which your Lordships decided contrary to my opinion, contrary to the opinion of the great majority of the Judges, contrary to the opinion of my noble and learned friend Lord Lyndhurst (with whom, by the way, I have consulted upon the similar points in the present case, and who entirely agrees with me in opinion upon them). We were clearly of opinion that the case was wrongly decided, but we bowed, as was our duty, to the majority of your Lordships, who decided for the Plaintiff in Error; and, indeed, that decision was only disputed by me on the ground of precedent and practice. Your Lordships, admitting the precedent and practice, held it to be *mala praxis*, and that it was fit to be reformed.

But the rule to be collected in that case is, that in criminal cases, contrary to the opinion of Lord Mansfield,—*obiter*, certainly, but a *dictum* deserving of the greatest consideration, and entitled to the most profound respect,—that the rule is the same in criminal as in civil cases. I never doubted, Lord Lyndhurst never doubted, the majority of the Judges never doubted, that it was so in a civil suit. If there are two counts, one of which is bad and the other good, and there is a general finding for the whole, you cannot apportion the damages between the two; you cannot say how much applies to the good, and how much to the bad; and therefore the whole is bad, and there is judgment *non obstante veredicto;* or, if judgment has been given for the Plaintiff, it must be corrected. But now that rule is applied to criminal cases as well as civil. The law, therefore, is general, that there can be no judgment upon a verdict so taken, either in a civil case or in a criminal; and for the very reason which applies to the case at bar. I have, however, said that it gives me great satisfaction, after the anxious attention which I have given to this cause in all its parts, that I am not reduced to the necessity of deciding it upon the ground I have adverted to, though that probably might be enough to support the judgment of reversal which I shall move your Lordships to pronounce. But there are, in my opinion, other grounds on which that judgment may be supported. To the consideration of these I now proceed.

And first, my Lords, I will again advert to the time which has here elapsed. Thirty-seven years after the one deed was made, and thirty-nine years after the other, an impeachment by this action, upon the allegation of fraud, is brought against those instruments, and that fraud is imputed to a gentleman hitherto always supposed, as is said (but it is immaterial, though I must assume it to be so), of fair and respectable character; and his nearest relations are now to defend his memory, and defend their own rights against that foul imputation of fraud, and fraud of

the worst description; for it was taking an unfair advantage of his nearest relations, whom he was rather bound to protect than entitled to deceive.

My Lords, no time will run as a common law limitation against fraud. That must be on all hands admitted. No time, say the Scotch lawyers, can be taken as a bar to an action of reduction like this, unless time and acquiescence be specially pleaded. A party meaning, say they, to avail himself of the topic of time, must do it by a plea, and must either succeed altogether, or (I suppose they mean to add) fail altogether. I cannot go so far as that. I too say that no time will run to protect and screen fraud. I too say that a Court of Equity will overleap the barrier of time to get at the fraudulent parties and their deeds, and to undo those deeds, and to prevent any one, whether accomplice or innocent, from profiting by the fruits of fraud. I too say, therefore, that the length of time which has elapsed is not a bar to the suit. But that it should not enter into our consideration—that it is to be wholly dismissed from our minds—that, as a suggestion, it is to have no effect upon us in moulding our opinion, as it were, and influencing the frame of mind in which we shall be when we are to consider the rest of the case either as a jury upon the facts, or as judges upon the law, to that proposition I cannot assent. The parties are all dead long and long ago. The party accused, Walter Irvine, died nine years before the action was commenced. Of the other parties who survived, the latest died four years before the action was commenced; and all their agents and men of business are in their graves. Every one who by parole testimony could have shed any light upon this transaction is gone. The suit is brought thirty-seven and thirty-nine years after the fraud is alleged to have been committed. Forty-six years and forty-eight years after that fraud is alleged to have been committed, the first trial by a jury takes place, and the matter of fact of the fraud is to be submitted to that jury after the lapse of nearly half a century.

Am I not to take into account this grievous injury to the party charged? I do not mean to the memory of Walter Irvine and the feelings of his surviving family, but to the parties charged and sought to be deprived of their property under those deeds. Am I to dismiss that entirely from my consideration, and to deal drily with all the facts and all the law of this case exactly as if it had happened three or four years before the action was brought, or perhaps as many months? I cannot go this length. On the contrary, I hold that the consideration of time is most material; and I fearlessly lay down this to be the law of Scotland, as well as of England, that in such circumstances, lying bye is most material to be considered, and that it must tell against the party, if there be no explanation, or rather if there be no satisfactory excuse for it. And that the party here and his advisers are well aware of this topic is clear, for their summons sets forth a reason to excuse the lying bye; but it is no reason at all. They say, that until the chancery suit was decided, which I did not dispose of finally till 1833, they could not bring the action. Why could they not? They did not choose, because they did not know exactly whether it would be worth their while or not; but that, though it may explain, is not a reason to excuse the delay. It is not even a topic of argument. I say, then, I lay it down fearlessly as the law of this country, and of Scotland, and of every country having an enlightened and rational, I may say a civilized system of jurisprudence, that in such a case as the one before us, the party must be held to the very strictest proof in regard to the facts; but that is not all. I go further; and I hold that also, in regard to the pleading, to the shaping of the action, which is his own choice, though he cannot choose the facts, he shall be held most rigorously to the principles of strict logical pleading. It is a case in which I would hold him as tight as if it were a question of an indictment for perjury and assignments of perjury were required that A. B. did falsely swear so and so; whereas in truth, and in fact it was so and so. It is

a case in which, as Lord Mansfield once said when similarly circumstanced, though not in respect of time or of fraud, I would hold the party to the ticking of a *t* and the dotting of an *i* in his pleadings.

Unfortunately, my Lords, this does not appear to have been the view taken of it by the learned Judges in the Court below. The Lord President, who entirely disapproved of the verdict, and who alone of the four learned Judges pronounced a very positive, clear, and unhesitating opinion one way, relies very much and largely upon the point of time. Lord Mackenzie alone, of the other three, makes any allusion to it; and he says, "Delay is less material in this cause, because the evidence is "documentary, and *litera ripta manet*, and therefore this "objection is of no great force." It should have occurred to his Lordship, as it does to me, that it might have been not so wholly documentary if the action had been brought three or four years after the alleged fraud was committed. Lord Fullerton says nothing of time at all, though the Lord President seems to have thought it nearly decisive; and though Lord Mackenzie thinks it a matter necessary to deal with. Then upon the case itself, Lord Jeffrey says there is great hardship. But of what kind? On account of the magnitude of the sums and the reputation and character involved; but he does not make the least mention of the greatest hardship of all, namely, the lapse of seven or eight and thirty years. These learned Judges, exceptthe Lord President, give no clear and decided opinion; and though the merits of the verdict be not now before us, yet considering the conclusion at which I have arrived, and which I wish your Lordships to adopt, I feel this a comfortable circumstance. One of them, Lord Mackenzie, says, "Looking at "it altogether, I cannot say the verdict is grossly wrong. I do "not say if I had been on the Jury, I would have given the same "verdict, but I cannot say they are grossly wrong." Lord Fullerton says, "There is no doubt that the case in evidence is much

"weaker than the case averred upon the record." And he goes chiefly on the concealment, making little reference to the misrepresentation. Lord Jeffrey says, "On all grounds there is "great room for diversity of opinion. The Court might differ "from the Jury, but that is not enough." Then he sums up: "I rather think that the impression on my mind is that the "arrangements were not fairly obtained." These things go entirely to the merits of the case. In point of fact we are only upon the record. At the same time I feel great satisfaction in looking over this mass of evidence, and examining these opinions of the learned Judges, in feeling perfectly assured that if I had been in the Court below, I should have agreed with the clear opinion of the Lord President, differing, I will not say from the very clear opinion, but from the very hesitating and not even perfectly formed opinion of the other three Judges who dissent, and only dissent so far as to say that they do not think the Jury were what they call so "grossly "wrong," as would justify sending the case again for trial.

We now therefore come, my Lords, to the frame of the record, upon which everything turns; and as your Lordships sit upon important business at five o'clock, by which time I shall not be able to finish what I have to state in addition to my argument upon the law of the case, I think that the more convenient course will be, that I should finish my observations to-morrow rather than to-day. Therefore, if it is your Lordships' pleasure, we will conclude the consideration of this case to-morrow. The case is one of great anxiety, and it is very fitting therefore that I should now state the conclusion at which I have arrived for a reversal. If I should not to-morrow be able to move the judgment I have, in case of any accident, announced the conclusion to which I have come, as I did in that very case of Leith *v.* Irvine. The inquiry having lasted twenty-five days before me, I would not expose the parties to the expense and delay of a re-hearing when it had arrived at the

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last stage, and I therefore give the judgment during the sittings. I shall therefore hope to conclude my observations to-morrow, either at the sitting of the Court or at the close of the Court, whichever is most convenient to the parties, taking a course of which we have many examples, as that pursued by Lord Eldon in the Roxburgh case and others.

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LORD BROUGHAM.—My Lords, I had yesterday gone through the two important points of the lapse of time and the state of the pleadings, and it remains for me to apply the principles which I then laid down to the particular case of this record. When I stated my opinion with respect to the double question involved in the issue, and the single finding for the Pursuer upon the whole matter, I might have illustrated it, as one or two Special Pleaders with whom I have had communication upon the subject have done, by reverting to the rules of pleading in England. Suppose an action is brought upon a bond, and the Defendant, in order to escape from his obligation, specially pleads thus, that it was obtained from him by the obligee, the [Plaintiff, by means of fraudulent misrepresentation or fraudulent concealment—suppose fraudulent misrepresentation is the ground of one special plea, and fraudulent concealment of another; and suppose the fraudulent misrepresentation is stated validly and unobjectionably, as thus—inasmuch as so and so was represented by the obligee, contrary to the truth, and contrary to his knowledge of what the truth was. If the verdict were upon that count, no question it would stand for the Defendant. But suppose there were another count, setting forth, as an excuse for the non-payment, fraudulent concealment, inasmuch as so and so, which amounted to no fraudulent concealment, either because there was no duty to disclose it, or because the statement was *felo de se*, showing

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in itself that there was no fraudulent concealment; past all doubt, no verdict could stand upon that count. Then suppose a verdict were given upon both counts without distinction, and the judgment were entered up on both counts generally, without distinguishing on which of the two, and without saying it was upon both, but only negativing that it was upon neither, that would be this case. Well then, past all doubt, upon a writ of error, that judgment could not stand. Then the question would be, whether to give judgment for the Plaintiff, in consequence of the badness of the verdict and the judgment, or to award a repleader, or to award a *venire de novo?* A repleader could not be awarded, because it would be in favour of the party who had made the first fault in the pleading. A *venire de novo* could not be awarded, because it must be upon the same record and the same issue, and *non constat* that the jury would not return the same verdict, for you have no means of compelling the jury to separate the one from the other of the issues, and to return a special verdict. Consequently there must be in that case judgment for the Plaintiff—that is to say, judgment against the plea—that is to say, judgment against the defence, resting upon the ground of fraudulent misrepresentation or fraudulent concealment. Now that is just the case here, except that here it is Defendant who is claiming the benefit of the rule, there it would be the Plaintiff claiming its benefit against the plea in justification of non-payment.

However I have stated already my satisfaction at finding that it is unnecessary to decide the cause upon this point. I have also stated enough with respect to the time, laying down the principles, of which there is no question, that mere lapse of time is no bar in the case of fraud; that possibly time, may, according to the Scotch rules, have been necessary to be pleaded, and yet it is not pleaded—there being no plea of acquiescence or homologation. But although no bar, either here or in Scotland, although it may, by the Scotch rules, be

necessary for the party to plead it specially, in order to make it an answer to the action, it is still most material, not only upon the evidence for the jury, and upon the question of a new trial for the Judges (with which we have nothing to do) but it is most material upon the question of pleading also; and that after such a lying bye as has here happened, in scanning the averments on this record, we must, in Lord Mansfield's phrase, hold the party to the ticking of a *t*, and the dotting of an *i*, if need be, for deciding the question.

I must now, however, say that it does not, upon the best consideration which I have been able to give the whole matter, appear to be at all necessary that the party should be held to that rigorous closeness. It does not appear at all necessary in support of the judgment which I am about to move, that we should rest it on the length of time which has elapsed, the decease of all the parties, the decease of all their agents, and of all persons connected with the transaction, for I think even *de recenti facto*, this record would not have been sufficient, according to the closeness and strictnesss of procedure to which the party must be held in ordinary circumstances.

What I have now to state ranges itself under five heads: *First*, the general allegations contained in the 5th, 6th, and 7th articles of the condescendence, but into which I need not enter so much at large, because I shall afterwards have to deal with the same-subject matter under the other heads. *Secondly*, with respect to the mortgage debt on this estate. *Thirdly*, with respect to the misrepresentation (and hitherto I am only upon fraudulent misrepresentation) the charge that Walter Irvine represented himself as having given 1,200*l.* to Christopher, whereas he also released a debt; but this suppression of what passed with Christopher is also stated as a concealment. *Fourthly*, the correspondence which took place with one of his sisters with respect to the opinion of Sir Arthur Pigot, then Mr. Pigot, and of Mr. Brown, an attorney; a correspondence

showing a misrepresentation partly, and partly a concealment. *Lastly*, the deed of assignation to Mrs. Burn, which stands upon a separate ground. When I have gone through these different heads, I shall have exhausted the case.

1. Now, with respect to the statements in the 5th, 6th, and 7th articles of the condescendence, if you take the memorial which is given in page 41 of the Appellant's case, it is found that the statement in article 5 of the condescendence is not contrary to the fact when coupled with what the memorial discloses. That memorial is to be taken as a communication made by Walter Irvine, and not only as a communication in point of fact made, but as a communication set forth upon the pleadings to have been made, and forming part and parcel, therefore, of the alleged misrepresentation. Then comes article 6, wherein it is said that Walter Irvine himself stated on oath in the Court of Chancery that the mortgage debt in 1797 amounted to 30,000*l.* or thereby, and the final report by the master subsequently ascertained it to be 22,000*l.* with interest at 6 per cent. on 20,000*l.* Now I shall afterwards have occasion to refer to the memorial in page 42 of this case, which is part of the statement for the Pursuer. I shall have to deal with it separately immediately, therefore I need not enter further into it now than to state that upon the whole these two articles, the 5th and 6th, when you take the statement on page 41 and the statement on page 42 together, do not set forth, in my opinion, with any distinctness whatever, if at all, the charge of misrepresentation.

Then we come to the 7th article, which I must say is a very extraordinary one, and calls for an expression at least of astonishment on the part of the Judge who considers it, recollecting the importance of the matter with which we are dealing, and the absolute necessity of some clear, and intelligible, and consistent specification. "The said Walter Irvine, as having "or pretending right to the said mortgage debt, was found by

" the said master to have received payment of the whole of this " debt, both principal and interest, out of the estates of the said " John Leith, being the produce of the Old and New Grange " plantations prior to 1819;" nineteen years after the deed in question, and he is to be charged with prescience,—he is to be charged with a foreknowledge in the year 1798, when one deed was obtained, and in the year 1800, when the other was executed; 21 years and 19 years respectively, of what was to be the produce of the crops of that very regular, clearly-established, and uniform course of cultivation, that of a West Indian estate, where there are no tornadoes, where there are no earthquakes, where there are no changes of weather, where everything is as regular and mechanical as clockwork, as if it were a farm in Norfolk or a farm in East Lothian. That is what he is expected to have had a foreknowledge of in the year 1798, when he obtained the one deed, and in the year 1800 when he obtained the other.

However I dwell not upon that, because, of course, the present Respondent does not mean to rely upon that extraordinary statement. Let me, however, here remark upon the carelessness with which these pleadings are framed. One would have thought that if you wanted to charge parties with a gross fraud, you might have been a little more careful in setting forth known facts. What shall be said of persons who actually aver in their summons that the cause of Leith *v.* Irvine was carried by appeal to the House of Lords, and decided here on the 30th of March, 1833? Nothing of the kind; no appeal was made to this House; they ought surely to have known that. When they charge their fellow men with gross frauds, they should take a little trouble in considering what they are about, especially when they rely upon the Chancery proceedings as the excuse of their delay; and affirm that until these proceedings were over they could not bring the present action. There was an appeal, no doubt, in the Chancery suit, an appeal under which I suffered for 25 days; but it was

not an appeal carried, as the summons sets forth in so many words, from the Court of Chancery to the House of Lords, and decided in the House of Lords on the 30th of March, 1833. It never came near us; there was no appeal here; it was an appeal from Sir John Leach, the Master of the Rolls, to me as Lord Chancellor, and I decided it on the 30th of March, 1833. My Lords, I do not mean to say that this blundering statement goes to the question with which we are now dealing, but I note it in passing to show the great carelessness and remissness which seems to have presided over the whole of this extraordinary case—a case of all others requiring the greatest care and the most cautious circumspection.

I now come to the second head, which is the main ground of the charge of misrepresentation. That is in article 6 of the Condescendence to which I have already referred, where Walter Irvine is said, in certain proceedings in the Court of Chancery, to have stated, as representing his brother Charles deceased, that the mortgage-debt due was "30,000*l.*, or thereby." Now upon this I would remark, that if it was intended to charge, as it is, wilful misrepresentation of the mortgage debt, the obvious course was, not to insinuate or to leave room for inference from circumstances merely, but directly to aver that he, Walter Irvine, represented one thing, when he, at that time of so representing, knew another thing to be the fact; that he knew the value to be this when he represented it to be that, or that he represented it as one thing while he knew it to be another thing. This is not done, but things are stated from which it may be gathered inferentially that his representation was incorrect. Now this is the very highest that we can put the averments at, namely, that things are stated from which it may be gathered that Walter Irvine's representations were incorrect, and incorrect to his own knowledge. But when we take all these accounts together, they do not even amount to this, for they end in averments which are quite destructive of the allega-

tion of misrepresentation. The allegation, taken altogether, is self-destructive as an allegation of misrepresentation, just as if one were to say "You pretend to rate the value at 1,000*l.*, "when it is, in fact, twice 500*l.*; and so you deceived us." But a statement that a thing is 1,000*l.* does not deceive persons when you aver as the ground of that deception and misrepresentation, that instead of 1,000*l.* it is twice 500*l.* Nay, in most cases, there was here no representation, but only an estimate, which of necessity, and *ex vi termini*, was conjectural.

Now look at article 6, and compare that article with the Memorial. There the mortgage-debt is alleged to have been stated at 30,000*l.*, whereas the report of the master found it to be 22,841*l.* Compare that with the Memorial at page 42: "It "may be further necessary to observe:" now this is just as much parcel of the alleged misrepresentation as if it had been contained in the summons or the condescendence, because it is imported into it by way of reference. Walter Irvine is condescended upon as having made a representation by means of this Memorial. "It may be further necessary to observe in regard "to the debt due from the estate of Mr. Leith to Mr. Irvine, "that the accounts of his intromissions are not yet finally "settled, nor is it expected they will, but in the Court of "Chancery," which proved too true, and they were not finally settled till the 30th of March, 1833. "The balance due to Mr. "Irvine was supposed by himself to be 37,000*l.* or 38,000*l.*, "and from the before-mentioned transaction entered into "between Mr. Christopher Irvine and the Attorney of General "Leith, it will have been observed, the appraisement of the "estate of the Old Grange amounted to 31,026*l.* 14*s.* 4*d.*, and "that estate was delivered over in due form to Mr. Irvine in "part of his debt."

Now let us look at article 28 in page 18. "These "offers having not been accepted, Walter Irvine, on the 29th "of January, 1800, wrote a letter to his sisters, Mrs. Kirk-

" patrick and Miss Irvine;" this is the letter on which reliance is placed as showing misrepresentation, " in which he thus men- " tions the settlement he had made with his sister, Mrs. Burn, " and his brother Christopher." I do not go upon that, because that comes under the other head, under the head of concealment, at which I have not yet arrived; but the following is stated as the representation. " In this letter," says the condescendence, " he," Walter, " mentioned the mortgage upon " the property in these terms." Now here is the representation, the inconsistency of which with the fact to his knowledge is to be the ground of impeachment; " We will suppose the " Grange debt still to be from 15,000*l.* to 20,000*l.*, call it " 18,000*l.*" Can any man who knows the meaning of words, who is ever so little acquainted with the force of language, whether technical or in common parlance, state or fancy for a moment that this is a representation? It is an estimate, and a very conjectural estimate, and an estimate which leaves a large margin for conjecture. He does not say it is 15,000*l.*—he does not say it is 18,000*l.*—he does not say it is 20,000*l.*—but he says it is from 15,000*l.* to 20,000*l.*—call it, splitting the difference, and inaccurately splitting the difference, 18,000*l.* And how does he preface it? Not, it is so; not, I tell you it is so; not, I represent it as being so, but only, " we will suppose the Grange debt" so and so. Can anything be more manifest than that this is anything rather than a representation? It is actually saying, put it at so much; I do not know what it is, but I will take it to be so much; I will suppose it from 15,000*l.* to 20,000*l.*, say 18,000*l.*

Then article 29 also refers to it. The first part of this article relates to the transaction with Christopher, which I reserve for the next head of my argument; but here is the part that refers to this representation. " And in regard to the " Grange debt, instead of 18,000*l.* it was estimated by Walter " Irvine himself judicially on oath, within eighteen months of

"the time when he wrote this letter, at 30,000*l.*" Well, he might have been quite right at one time in estimating it at 18,000*l.* and at the other at 30,000*l.*; and a man's estimate at different times varying from the one to the other date is no proof that he made a *de facto* representation at the one time and that he, *de facto*, knew it at that time, for he may have known it quite differently when in the Court of Chancery he came to swear to it.

The result then of these statements so taken together, and which are made as averments of misrepresentation, is this—Walter Irvine estimated the debt at 18,000*l.*, he claimed 30,000*l.* He fully and distinctly stated to his sisters that Mr. Leith or his agent set it at 17,622*l.*,—in the year 1792, he as fully stated to them that Charles Irvine believed it to be between 37,000*l.* and 38,000*l.*—he himself, in his answer in Chancery, set it at 30,000*l*, and claimed that sum, but in that Chancery suit, nearly 40 years after the arrangement with his sisters, the amount was found to be 22,841*l.*, at which sum on the final hearing of the appeal, I, and not the House of Lords, determined it and decreed accordingly. This is even somewhat less of a misrepresentation, therefore, than the case which I put of the 1,000*l.* and twice 500*l.*—it is rather as if the charge of misrepresentation were stating the 1,000*l.* when the real value was 500*l.* for it is an allegation that Walter Irvine had given in the sum of 37,000*l.* or 38,000*l.* instead of 22,841*l.*, or some 14,000*l.* or 15,000*l.* more against himself than it really was, or than he could know it to be unless he were gifted with a fore-knowledge of my decree made nearly 40 years after his alleged misrepresentation and 9 years after he had gone to his grave. As to what he is averred in article 28 to have said in his letter of the 29th of January 1800, it is plainly not an averment that he made any representation at all, for the reasons I have already given in dealing with that conjectural statement. It was a conjectural estimate, and nothing else.

Thirdly, the other charge of misrepresentation is, that Walter Irvine represented himself as having given 1,200*l.* to Christopher in his transaction with that brother; and this charge is to be found in article 28, at p. 18. Now, let us see what is there set forth. It signifies nothing what was the fact, but let us see how it is set forth. Observe this is a letter purporting to give an account of those events after they had happened. "I think it necessary to inform you the settlement "I made with Mrs. Burn stands thus: 100*l.* a-year annuity to "be paid on the joint lives of her and her husband in lieu of her "rights. To our brother Christopher I paid," not I have bargained for or bought his rights at so much, but "I paid "1,200*l.* twelve months after he made the assignment. As "for Mrs. Wardrobe, I never gave her a farthing." But ought not this to have been set forth thus, that he had said, to our brother Christopher I paid 1,200*l.*, and no more, as a consideration for his share? It is not so set forth. It is set forth, "To "our brother Christopher I paid 1,200*l.* twelve months after he "made the assignment." Walter Irvine is not alleged to have given the terms of his bargain with Christopher. He is alleged to have related the fact of his paying Christopher 1,200*l.* a year after the bargain, whatever that was. He is not averred to be talking of the terms of the bargain; he is saying nothing about those terms; he is stating,—that is, he is alleged to be stating,—the fact, that twelve months after the bargain, whatever that bargain was, which he does not say a word of, he paid 1,200*l.* to his brother, which is not denied to have been the truth; but in the other parts of the summons and condescendence is, in fact, stated to have been the truth. Therefore that averment really and truly goes for nothin .

Next come we to the graver and greater charge of concealment. Now the case stands thus:—Christopher owed Walter money; it is not ascertained how much,—it is called 5,000*l.* or 6,000*l.*, but that clearly means currency; it is 2,000*l.* or 3,000*l.*

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cash. Christopher and he appear to have been, and they are stated (I am taking it only from the pleadings, of course, I cannot travel out of them,) to have been upon very cordial, very affectionate terms. There seems to have been little or none of that affection towards the sisters. Christopher having claims upon the personalty, Walter bargains with him for giving up those claims to him; and as to the bargain, there is some little doubt upon even the pleadings, and I cannot go into the evidence whether that debt was ever meant to have been exacted from his brother Christopher. But be that as it may; assume that in the pleadings Christopher is stated to have owed him money, though that, like everything else, is set forth rather inferentially than *de facto*, as it ought to be in charging fraud. Assume that he owed Walter money, that Walter released the debt, and gave him 1,200*l.* besides; and further (for that is also stated in the pleadings) that he pressed upon him, delicately calling it a condition of the bargain, 200*l.* a year for his life, and 100*l.* a-year for his surviving widow, should he pre-decease her; this was added *ex meră gratiâ*. Now the charge of concealment is this, that he did not tell the whole of the transaction with his brother Christopher to his sisters: that he kept them in ignorance of it. And it is also set forth that Christopher "aided him," as it is termed, in that concealment; it is distinctly stated that they arranged to conceal the transaction from the sisters, "and the two brothers acted upon this arrangement. "Christopher William aided his brother in misrepresenting the "nature of the settlement between them, and advised his sisters "to trust themselves in Walter's hands, and to confide in his "generosity." Now, when a person is set forth as an accomplice in a fraud, as accessory to, and sharing in the commission of a fraud against his sisters, one expects to see it set forth how he shared. The concealment of a transaction by any person is intelligible, but that another party aids in the concealment is a most vague, indefinite, and unsatisfactory aver-

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ment. It is not said how or in what way, but at all events this is the averment, that the transaction with Christopher, by which Walter became entitled to Christopher's share upon the payment of 1,200*l.*, and releasing a debt, was not communicated by him, Walter, to his sister, Mrs. Burn, or to his sister, Miss Irvine, or to the other two sisters, Mrs. Wardrobe and Mrs. Kirkpatrick, at the time or before the time when he obtained from them the two deeds: and it is said that by keeping them in ignorance of this, he kept them in ignorance of the value of what he was getting from them; for the argument is, by way of inference only, that Christopher's share was worth no more than theirs, and that if Christopher's share was worth the debt and the 1,200*l.*, their share must have been worth the debt and 1,200*l.* It is not denied that he told them of the 1,200*l.*,—that is admitted; but it is said, as one of the charges, that he did not tell them of the release of the debt; that he concealed, therefore, a part of the transaction.

A concealment, to be material, must be a concealment of something that the party concealing was bound to tell. It is perfectly evident that if I bargain to buy a property from A. B., and if the person with whom I bargain, the owner of the property, has before that had an offer of 1,000*l.* when he asks me 1,500*l.*; and, to put it stronger, if he has hawked it in every part of the land market to which he could find access, and has found no person to offer him more than 1,500*l.*, and he asks me 2,000*l.*, I have no right, if I give him the 2,000*l.*, to bring him into a Court of Equity, as having deceived me on the value of that property by having failed to inform me that others had only offered him for it 1.500*l.*; that he had tried to get a better price for it, and had failed to get a better price for it, and that yet he made me pay 2,000*l.* for what he himself ought to have known he had never been able to get above 1,500*l.* It is a mode of estimating the value of the property which he has taken for himself; it is a mode of estimating

its value which does not bind him, and does not benefit me. It might be his perfect right to make me pay 2,000*l.* for what he had not been able to sell at 1,500*l.* to others. He had no duty whatever, either in law or morality, to tell me what he had done. His concealment of what he had done, his withholding from me the knowledge of what he had done, is not even any argument, much less is it any ground of equitable relief against him for a fraudulent concealment. To give relief there must be a concealment of something which he was bound to disclose. And Walter Irvine, past all possibility of doubt, was not bound to disclose what had taken place between him and his brother Christopher Irvine.

But observe, I am putting the case lower than the fact, because the fact, as set forth in the Record, is this, that the brother did not stand in the same relation towards Walter Irvine in which the sisters stood. The brother's bargain with Walter was made up, partly of a claim of right, and partly of the favour and bounty of Walter. Walter was so fond of his brother that he not only at once released the debt and gave him 1,200*l.*, whether it was worth that or not, but he pressed upon him, he insisted upon it, says the averment in the condescendence, he insisted upon his taking 200*l.* a-year for himself, and 100*l.* for his widow, all owing to kindness and favour towards that brother Christopher. Did the sisters stand in the same position? Was what passed between Walter and Christopher any rule for what should pass between Walter and them? No such thing. What passed between Walter and Christopher stands upon its own foot, and is totally independent of, and necessarily unconnected with, what was passing between Walter and his sisters.

Therefore I say that this is a concealment of that which the party was not bound to tell—it amounts to absolutely nothing whatever material, that is alleged thus to have been concealed. I should say that it ought to have been set forth a great deal

more particularly, even if it had been so, than it is in the 13th, 14th, 15th, 16th, and 17th articles. But not a word of all this, observe, appears upon the summons. Now the summons ought to contain that which the condescendence specifies, more minutely, but in the summons there is no particular averment whatever under which this can come except the general charge of fraudulent concealment. It should have been set forth that certain things passed between Walter and Christopher, which he was bound to communicate to his sisters, and did not communicate to them, and the not communicating of which was fraudulent. The statement is not by any means so, but it is far more precise than that of misrepresentation with which I have dealt. Let us take that statement of concealment, therefore—let us put it as high as we can, and, admitting it to be validly alleged, let us see whether, when taken altogether, it amounts to a concealment, not only of that which was material as tending to the price of the deeds with his sisters, but whether it is a concealment of something which they had a right to know from him, and his withholding of which amounted to concealment fraudulently done. This question I have shown must be answered in the negative—no such averment is made.

In the *fourth* place I come to article 23, on page 17, and which amounts to this, that Walter had been consulting with Mr. Pigot, afterwards Sir Arthur Pigot, who "advised him that "the personal property descended to the nearest of kin, brothers "and sisters;" that is, not to Walter himself, provided the party was domiciled in Scotland. "Miss Margaret Irvine had "applied to Walter, for some information as to Charles's "succession, in which she and her sisters thought they must "have an interest, and requested leave to wait on her brother, "respecting this business. Walter, on the 27th April, returned "the following answer. 'Mr. Irvine begs leave to acquaint "'Miss Irvine, that all persons who had claims on the estate "'of the late Charles Irvine, were by public advertisement

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"'directed to lodge them with Mr. Charles Steuart, W. S., "'which he deemed sufficient notification; but for her more "'immediate satisfaction, he begs leave to transmit a paragraph "'of an opinion he only received yesterday, from an eminent "'solicitor in London:—'"The whole of the real estate descends '"to the heir-at-law, who is his next eldest brother, if he died '"without issue, and no will, and the personal estate equally '"divided amongst his brothers."'" I have yet to learn that a person receiving an opinion from an attorney, or from counsel, is bound to give that opinion, and to give the case upon which it was taken; for that is implied here, in the usual mode of pleading followed in this extraordinary case, by inference and insinuation, and not directly stated: it is implied that he ought to have given the case, as well as the opinion. "'J,'" that is Walter, "'does not vouch for this opinion being the law.'" There is here no very great misrepresentation even of the law. "'Those who think themselves aggrieved, may have their "'recourse how they may.'" If you are dissatisfied with Mr. Brown's opinion, whom I have consulted,—you who have not seen my case, and which case I do not choose to show you, and which I am not bound to show you, may get another opinion, and a better opinion, if you choose; do not take mine; I do not vouch for its being the law; and I tell you nothing of the facts upon which it is given. The opinion without the case, certainly, or the case without the opinion, is not worth much, but a man is not bound to tell his case, any more than he is bound to give the opinion. He says, I will not tell you. I will not vouch for its being law, and the case I will not show you at all. '"Those who think themselves aggrieved, may have "'their recourse how they may.'" That is to say, you know there are sisters, as well as brothers; go and tell the facts, and get as many more opinions as you choose, of the counsel you like best. "'In the meantime, J,'" Mr. Irvine, that is, "'does "'not consider himself answerable in any shape, further than

" ' to secure his own rights." Really, I think anything less like a precise averment of misrepresentation, even as far as we have gone, I have hardly ever seen. However, the charge is partly insinuated, and partly stated, and it is this, that he had consulted Mr. Pigot, and told Mr. Pigot there were sisters as well as brothers; that he had consulted Mr. Brown, or got an opinion from Mr. Brown, who only knew of the brothers, and not that there were sisters; and therefore it is inferred (this is only inferential, it is not stated) that Mr. Brown had been told by him, that there were no sisters, but only brothers; and it is inferred that he tells the opinion of Mr. Brown, which does not mention sisters, and that he does not tell the opinion of Mr. Pigot, which mentions brothers and sisters. That is the allegation. Therefore the gist of this charge is, that he represented the law to them to be a division to brothers, and not to sisters, having got that law from one who did not know that there were any sisters; and who, if he had known that there were sisters, would have said as Mr. Pigot did, that they, as well as the brothers, must have their share; in short, that he did not tell the whole of Mr. Pigot's opinion, but only Mr. Brown's.

Now, as it stands, and without more, I do not think there is sufficient to warrant us in regarding this as a distinct charge. But suppose there were, it is completely contradicted by the rest of the allegations; because we are to couple with the averments in article 23, the statement in the Memorial to which we are referred at page 42, namely, the second page of the Memorial: "If Mr. Charles Irvine,"—now this is Walter's representation to the ladies—"If Mr. Charles Irvine is considered to "have died domiciled in Scotland, then his personal estate "will divide betwixt his youngest brother the said Christopher "Irvine, and Margaret, Eleonora, Isabella, and Ann Irvines, "his four sisters: but should Mr. Irvine be considered a West "Indian, or not to have been domiciled in Scotland, then Mr. "Walter Irvine, the heir, will also come in for a share of the

" personal estate, and which, so far as has been learned, will " consist of all crops off the ground in Tobago, in the store- " houses there, or on its way to Britain, all debts due in the said " island or elsewhere, by bond, mortgage, or otherwise, to the " estate," together with all the other circumstances; and he sets forth a great number of particulars of very valuable property. Is that concealing the law that the sisters were entitled as well as the brothers? On the contrary, it states it most fully and most correctly. It states it upon the supposition of Charles having died, domiciled in Tobago, which Walter, for his own interest, always contended he had; it also states it upon the the supposition, which is the fact in my opinion, contrary to Walter's opinion, that he had died, domiciled for the last six years, from 1792 to 1798, in his own country Scotland, and it states that in the one case, he (Walter) would share in the personalty as heir-at-law, and that in the other case he would be excluded, and the sisters with the younger brother would take. That is just the very thing which Mr. Pigot's opinion told him, which he is charged with concealing, and which Mr. Brown's opinion did not tell him, and which he is charged with giving them as a misrepresentation. The Memorial, to which we are referred as parcel of the representation, states the very thing which they say he ought to have stated.

But that is not all nor nearly all, for there is what puts this part of the case out of Court more signally than the rest. In order that the misrepresentation or the concealment (I care not which—this charge is made up of both) may be of any avail whatever, it must be *dolus dans locum contractui*, it must inure to the date of the contract. If one party misrepresents or conceals, however fraudulently, however wrongly, and however wickedly to another with whom he is treating, and if that other, notwithstanding the misrepresentation, discovers the truth, and notwithstanding the concealment, gets at the fact concealed, before he signs the contract, the misrepresentation and the con-

cealment go for just absolutely nothing, becauae it is not *dolus qui dat locum contractui.* It is of no avail if the party has, in whatever way, become acquainted with the truth at the time, but much more so if he shows that he has become acquainted with it in the very deed which is said to have been obtained from him by the party misrepresenting or concealing. Now this very deed (I need not read it) contains a distinct statement both of the one and the other of the sisters having claimed *quasi* executors-dative and next of kin to Charles Irvine at Edinburgh, on the supposition of his having died domiciled in Scotland. There is an end, therefore, entirely, of this head of misrepresentation or concealment.

Hitherto I have been dealing with the deed No. 55. I have been dealing with the question as regards the Misses Irvine; we now come to that question with respect to Mrs. Burn; it need not detain us so long. The misrepresentation there is charged in article 19. "The first of his sisters with whom "Walter Irvine effected a settlement was Mrs. Burn, who had "married a clergyman. These people appear to have placed "implicit confidence in Walter Irvine and his agent Mr. Steuart. "Mrs. Burn having applied to Mr. Steuart for information as to "the personal succession, Mr. Steuart, on the 6th of June, 1798, "wrote to her a letter, in which he represented it as uncertain "whether the personal estate would be equal to pay the debts "affecting it. This appears to have been the only information "furnished to these simple-hearted people before they agreed to "assign over their rights to Walter Irvine." Then comes the offer made by Walter. Is this a misrepresentation of Walter Irvine or a concealment of Walter Irvine? It is a misrepresentation or it is a concealment of Mr. Steuart, and they attempt to bolster up that by the immediately preceding article 18, saying that he did not tell Mr. Steuart the whole.' He was not bound to tell Mr. Steuart the whole if he did not choose. But it ought to have been alleged that Walter Irvine had, by his agent, misrepre-

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sented, and that he had told his agent so to misrepresent, for as fraud is never to be presumed against a man, much less is the misrepresentation of his agent to be set down to the debit of his account, as himself fraudulently misrepresenting. Nothing can be more clear and simple than this; nothing, therefore, can be more clear than that the fifth and last head of this case is quite unsupported.

My Lords, I come therefore to the conclusion that upon this Record no judgment can pass to sustain the charges. I come to this other conclusion, that Judgment of Absolvitor must be immediately passed, assoiling the Defenders from the conclusions of the summons. And I have great satisfaction in thinking, that besides the argument which I have held upon the lapse of time, that besides the topics to which I have had recourse upon the frame of the Record, and upon the frame of the issue, the examination of the Record enables me to recommend this course to your Lordships, it being unnecessary to decide the question of the verdict and judgment, making no specification as to misrepresentation and to concealment, because I am of opinion that there is neither an allegation of misrepresentation nor of concealment. The question as to the joint finding and judgment, could only have arisen if there had been a valid allegation of the one, and an insufficient allegation of the other, but there being neither an allegation of the one nor of the other, of course, in that case, the question does not arise to call for decision. I have also, though it was wholly unnecessary, looked into the evidence in the cause, and I have anxiously examined the opinions of the learned Judges. Three of them expressed a very doubting and hesitating opinion in favour of the verdict of the Jury; the fourth expressed a clear, deliberate, and, in my opinion, a well considered, and a well answered opinion against the verdict of the jury. It gives me unspeakable satisfaction that I do not dispose of this case without having not only well weighed these learned and elaborate

opinions, but also gone into the mass of the evidence itself. If I had been sitting in the Court below, I should have differed from the majority of their Lordships, and have agreed with the learned President in being utterly dissatisfied with the verdict. But that matter is not now for you or for me to consider. I go upon the grounds which I have already stated, and it is but for me to add, that in my opinion the fair fame and reputation, as an honest man, of Walter Irvine, having passed through the ordeal of this litigation, is, in my deliberate and unhesitating opinion, wholly untarnished.

Sir Fitzroy Kelly.—Will your Lordship be pleased in giving judgment assoiling the Defenders, to give the costs below?

Lord Brougham.—Yes, the costs below. The costs of the appeal we cannot give.

Sir Fitzroy Kelly.—No, my Lords, we do not ask the costs of the appeal.

Lord Brougham.—Clearly in a case of fraud there must be the costs below.

Mr. Parker.—Your Lordship observes that the interlocutor appealed from, gives the Pursuer the costs of trying the issue, and the costs of the application for a new trial.

Lord Brougham.—We cannot help that; you must have, of course, the costs of whatever judgment is unappealed from: for instance, all the proceedings in which you prevailed below, and which could not be the subject of appeal. One was the having an issue at all, the other was the application for a new trial. We must not give you those costs because you prevailed below.

Mr. Parker.—The Pursuer will retain the costs below as to those, I understand your Lordship.

Sir Fitzroy Kelly.—No.

Lord Brougham.—They must not pay the costs of the whole action; they must be paid the costs of those stages in which they prevailed, and which have not been altered here.

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Mr. Parker.—I understand your Lordship to say, that instead of directing the issues, the Court of Session ought to have given an interlocutor of absolvitor with costs.

Lord Brougham.—Absolvitor with costs.

Mr. Parker.—Then of the subsequent proceedings, in which we have been successful, we retain the costs.

Sir Fitzroy Kelly.—Not the costs of the trial of the issues.

Lord Brougham.—No, not the costs of the trial of the issues, but the costs of the motion for a new trial.

Sir Fitzroy Kelly.—Just so; the motion.

Lord Brougham.—The costs of the argument.

Sir Fitzroy Kelly.—There are two matters of costs.

Lord Brougham.—Is there an appeal upon the interlocutor as to the relevancy?

Sir Fitzroy Kelly.—Yes, my Lord; therefore what I understand your Lordships to pronounce is, that the Defenders below were entitled to an absolvitor as at the time of the closed record with costs.

Lord Brougham.—Exactly.

Sir Fitzroy Kelly.—Then all that afterwards passed becomes immaterial, and there will be no costs on either side, except as to the two motions from which there could be no appeal.

Lord Brougham.—They must have the costs of those—the Pursuer must have the costs of those below.

Sir Fitzroy Kelly.—Precisely, my lord, the costs of the motion.

Lord Brougham.—In order to be quite accurate, both sides should give in a scheme, because sometimes it passes incorrectly in giving judgment. Mr. Parker on the one side, and Mr. Anderson on the other, or Mr. Parker's junior on the one side, and Mr. Anderson on the other, should give in a scheme upon the principle just stated.

Mr. Parker.—If your Lordship pleases. To enable us to do that, will your Lordship allow me to ask this question? The

interlocutor says, "Find the Pursuer entitled to the expenses "properly applicable to the trial of the issues." Are we to have those costs or not, in your Lordship's judgment, the costs of the trial in which we succeeded?

Sir Fitzroy Kelly.—Clearly not the costs of the trial.

Lord Brougham.—I am afraid they must pay the costs of the trial.

Sir Fitzroy Kelly.—It ought never to have been directed.

Lord Brougham.—They ought not to have gone to trial—there should have been an absolvitor—it is in consequence of the miscarriage in not giving an absolvitor that there has been an issue.

Sir Fitzroy Kelly.—Yes.

Lord Brougham.—However, you had better give in a scheme, and we will look at it in the course of the morning.

Mr. Parker.—We could not appeal from that, my Lord; we were driven to a trial and we succeeded, and the Court below have given us those costs.

Sir Fitzroy Kelly.—My learned friend says they were driven to a trial—they prayed for a trial.

Lord Brougham.—You do not appeal from that.

Sir Fitzroy Kelly.—No, it is we, my Lord, who were driven to a trial.

Lord Brougham.—I apprehend you were driven to a trial, and could not appeal.

Sir Fitzroy Kelly.—Just so, my Lord.

Lord Brougham.—Must not that be taken as a final interlocutor against you in the Court below?

Sir Fitzroy Kelly.—No, my Lord, for this reason, that the statute expressly permits a reservation of the relevancy of the Record. Accordingly it is upon the statute as to the relevancy of the Record that we now come before the Court. Therefore it is quite clear that we ought not to pay any of the costs of the issues which have been directed.

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Lord Brougham.—I will tell you what will be the best way. In your statement, which you need not give in before Monday, as we shall be sitting here till Wednesday, refer me to that, and Mr. Parker, having notice of what you mean to state, will be able to make a counter-statement. It is a very material thing, and may be very costly.

Mr. Parker.—It is very costly, and those costs have been occasioned by what your Lordship has now pronounced to have been a miscarriage of the Court below.

Sir Fitzroy Kelly.—But it was upon their application.

Lord Brougham.—I think it would be much better that you should give it in in writing.

Sir Fitzroy Kelly.—Precisely, my Lord—without occupying your Lordship's time now. All that we consider as determined now is, that there is to be an absolvitor with costs, as at the time of the closed Record.

9th August, 1850.

Expenses.—When expenses have been incurred by a proceeding authorized by the Court, which cannot be appealed without leave, they are to be allowed on the Appellant succeeding, in an appeal of the whole cause, in getting the particular proceeding disallowed.

LORD BROUGHAM.—My Lords, In this case I moved the judgment of the House reversing the interlocutor of the Court below, but a question arose of some importance with respect to the costs—important, not only as regards the amount of the costs, but important also as regards the point of practice. It was contended that the costs below should only be allowed up to a certain time, because after that time the costs which were incurred were consequent upon the error of the Court, which had been declared such by our judgment of reversal, and therefore it was contended that the subsequent costs should not be allowed. I have taken time to consider this question on account of its importance in practice.

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The rule is certainly general in the Court of Chancery that costs shall not be paid in consequence of the Court's miscarriage, and therefore the costs of proceedings which are consequent upon a decree or order that should not have been made, and which are the result of that improper decision, are, generally speaking, not given; though I think I have known exceptions to this rule; but then, it must be observed, that every decree or order, however interlocutory or provisional, in our Courts of Equity, is appealable; and the party allowing any one step to be taken, any one thing to be done, without appealing from the order in respect of which it is done, has himself to blame. Thus, among other matters, an order for an issue is subject to appeal. That is the matter in question here, and therefore I take it as an example. Here there was an issue directed, and the Court ought to have given an absolvitor instead of directing an issue upon the pleadings; but instead of absolving the party they directed an issue to be sent of nine or ten hundred closely printed quarto pages to a Jury—of all people in the world—to a Jury of twelve honest men—to consider whether all this showed fraud or concealment, or neither of them; and then it is said that that is an error, and that all these subsequent costs were owing to that error of not giving an absolvitor, but ordering an issue, and that those subsequent costs, according to the practice of the English Court of Chancery, ought not to be paid. I take, therefore, the instance, among other matters, of an order for an issue; but that, as I before said, is subject to appeal. It was expressly held by the Court in Hampson *v.* Hampson, *3rd Vesey & Beames*, p. 43, that an order refusing an issue is ground of appeal; and the House of Lords reversed in Nicol *v.* Vaughan, *2nd Dow. & Clarke*, 480, an order of the Master of the Rolls directing issues, and remitted the case to the Court, directing the Judge to decide himself, which he had been very reluctant to do, I may say, and it was only by compulsion that his honour did decide, for he had at first said

he would not do so. This was decided by myself in October, 1831, and Lord Lyndhurst assisted me and concurred in the decision.

With regard to the case at bar it is altogether otherwise. The appeal is by express enactment, 6th Geo. IV. cap. 120, sect. 23, taken away. I will read the words of the Act. "The "determination of such previous question of law or relevancy, "shall not be open to appeal to the House of Lords without "leave expressly granted, *reserving* the full effect of the objec- "tion to the decree in any appeal to be finally taken." No such reservation is made respecting any refusal or any grant of a new trial. That is not subject to any appeal in any stage. However no question arose here on this matter. But on the proceedings in which appeal is shut out with a reservation, the question is raised; and I am of opinion that the costs are justly due in respect of those proceedings which followed upon this miscarriage. An *absolvitor* should have been granted, and the consequence of its not being granted was the costs incurred.

The case of Galbraith *v.* Armour, 4 *Bells Ap. Ca.*, 374, was stronger than the present. There, the Court before answer, directed an issue to be tried; the Lord Ordinary having recalled an interlocutor of the Sheriff, this interlocutor of the Lord Ordinary was altered, and a trial had, which ended in a final interlocutor against the party in whose favour the Lord Ordinary had decided, and against whom the Sheriff had decided. On appeal from the Sheriff's interlocutor, and that of the Court, this House reversed both, and gave the costs in the Court below, including, of course, those which were consequent upon the erroneous interlocutor, although it does not appear that any objection was taken below to the ordering of the issues as there certainly was here.

What has been now said does not at all interfere with the practice of our Courts of Equity here, as stated by the Lord Chancellor in the case of Macmahon *v* Burchell, 2 *Phillips's*

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Reports, 127. The question now disposed of refers to the Scotch Court, the Scottish Statute, and the Scotch cases. Macmahon *v.* Burchell was an appeal in which the Court held the Vice-Chancellor to have been wrong in sending an inquiry to the Master on legal liability, when the facts were before the Court, *i. e.* before the Vice-Chancellor, without any inquiry, and on other grounds also, and his Lordship gave costs up to the hearing, and refused costs to either party subsequent to the hearing. Now it is plain that the Plaintiff had himself to blame for not appealing either to this House, or having the cause re-heard before the Chancellor. He did neither; but suffered all to go on as if the interlocutory order was right. To give him costs would, therefore, have been contrary to justice, as well as to the practice of the Court.

I have looked into the cases to which I was referred on either side, and an examination of them has made no difference whatever in my opinion. Maitland *v.* Horne, in 1 *Bell's Appeal Cases*, and Gordon *v.* Scott in 2 *Bell's Appeal Cases*, are, as far as they go,—I do not say that they are quite on all fours with this,—but as far as they go, they are rather in favour of the Appellant than of the Respondent, and I cannot comprehend how they can have been supposed to be in favour of the Respondent. Both what I said and what Lord Cottenham said there, is in favour of the present Appellant, as far as it goes. Hamilton *v.* Wright, in 1 *Bell's Appeal Cases*, is still more strongly in the Appellant's favour, and so is Stuart *v.* Gibson, 1 *Robinson's Appeal Cases*. The course of practice in the Court of Session seems, by the cases, not to admit the principles adopted by our Court of Chancery. The costs of the whole proceeding seem to be given to the party who finally prevails. This is illustrated by the case of Murray *v.* Murray, 1st *Dunlop, Bell & Murray*.

Mr. Parker.—My Lord, this does not include the costs of the application or motion for a new trial.

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Sir Fitzroy Kelly.—No; we all agree upon that.

Lord Brougham.—No; past all doubt, that is excluded.

Mr. Parker.—Those costs were given us in the Court below, and those we keep, that not being an appealable order.

Lord Brougham.—Of course. Whatever is given by an unappealable order you keep.

It is Ordered and Adjudged, that the said interlocutors, complained of in the said appeal be, and the same are hereby reversed: And it is further Ordered and Adjudged, That the Appellants be assoilzied from the whole conclusions of the summons, and that the Respondent do pay to the Appellants their costs in the Court of Session, including therein the costs of both the jury trials, but excepting those costs which by the interlocutor of the Court of Session of the 23rd day of June, 1838, afterwards affirmed by this House, were ordered to be paid by the Appellants to the Respondent, which last-mentioned costs the said Respondent is to retain, and excepting so much of the said costs as were incurred in relation to the rule for a new trial, which was discharged by the interlocutor of 18th January 1848, and that the Respondent do also repay to the Appellants the expenses which were paid by them to the Respondent under the interlocutor of 6th June, 1846, (*i. e.* the expenses of the application for leave to appeal the interlocutor approving of the issues): And it is further Ordered, that the same cause be remitted back to the Court of Session in Scotland, to proceed with the taxation of the costs so ordered to be paid by the Respondent as aforesaid, and to give decree for the taxed amount of such costs, and otherwise to proceed as shall be just and consistent with this judgment.

GORDON and SON—HALE, BOYS, and AUSTEN.

[HEARD 29*th July*—JUDGMENT 3*rd August*, 1850.]

HIS GRACE JAMES HENRY ROBERT, DUKE OF ROXBURGH, *Appellant.*

MRS. JANE WILLIAMSON RAMSAY, of Maxton, and OTHERS, *Respondents.*

Salmon-Fishing.—Fishing for salmon in the River Tweed by nets attached at one end to cairns built on the banks of the river, is not prohibited by 11 Geo. IV., and 1 Will. IV. cap. 54.

Statute.—When a statute, dealing with a particular mode of doing an act, declares the doing of the act in a particular situation to be unlawful, and imposes a penalty upon transgression, the inference is, that the act, not otherwise unlawful in itself, may lawfully be done in other situations.

IN the year 1739, John S. Kerr was infeft in lands lying in the county of Roxburgh, on the south side of the river Tweed. which was described in his infeftment to be "Totas et integras "terras et baroniam de Littledean alias Maxtoun nuncupat, et "burgo baroniæ ejusdem cum turre, fortalicio, maneriei loco "domibus, ædificijs, hortis, silvis, PISCATIONIBUS, molen., "multuris et eorum sequelis, partibus, pendiculis, et pertinen. "earund. quibuscunq.; totis et integris terris et villa de Maxton "cum domibus, ædificijs, PISCATIONIBUS, et alijs partibus, pen- "diculis, et pertinen. quibuscuncq. dict terris de Littledean "contigue adjacen. quemadmodum, Dominus Joannes Ker "easdem possedebat vel ad eas aliquando jus habuit, et similiter "in totis et integris illis terris de Maxtoun vulgo Rutherfurd's "lands nuncupat. cum domibus, ædificijs, hortis, pomarijs, et "omnibus earundem pertinen. quibuscunq., olim per quond.

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" Andream Ker de Littledean proavum dict. Joannis Strother " Ker a quondam Joanne Comite de Traquair conquest. et " acquisit. Totis et integris tribus mercatis terris terrarum eccle- " siasticarum de Lessudden vulgo terris de St. Boswells nun- " cupat. cum earundem PISCATIONIBUS SUPRA AQUA DE " TWEED USITAT. ET CONSUET. cum decimis garbalibus earun- " dem inclusis quæ nunquam a stirpe separari solebant, cum " earundem pertinen.; totis et integris terris ecclesiasticis cum " glebâ et mansione vicariæ de Maxtoun, cum domibus, ædificijs, " hortis, toftis, croftis, et cum decimis garbalibus earundem " inclusis, extenden. ad duodecem acras et dimidium acræ terræ " aut earcirca aliquando ad Jacobum Ker de Newbottle perti- " nen., et per dict. quond. Dominum Joannem Ker ejusq. " tenentes occupat. et possess; totis et integris sedecem acris " terræ cum lie Burnmiln, vulgo St Boswells Miln, nuncupat. " cum domibus et terris molendinarijs, aquæductis, et multuris, " dict. molendini, ac privilegijs ejusdem aliquando ad vicariam " de Lessudden tanqnam illius patrimonij partem pertinen. cum " domibus, ædificijs, toftis, croftis, et decimis garbalibus earun- " dem inclusis aliquando per dict. quond. Jacobum Ker ejusd. " tenentes occupat. integras dict. terras jacen. infra parochias de " Maxtoun et St Boswells, et vicecomitatum de Roxburgh."

In the year 1799 General Walter Ker, the successor of J. S. Ker, put up these lands for sale in two lots. One of them was purchased by Scott, of Harden, and the other was bought in by Walter Ker. These two lots were bounded on the north by the River Tweed, but were not contiguous to each other, as they were separated by a parcel of land belonging to the Appellant, called Maxton or Govan's land, which was also bounded on the north by the River Tweed.

On the 31st of July, 1801, Walter Ker expede a Crown Charter of that lot of the lands which had been bought in by himself, wherein, and in the infeftment upon it, they were described as " Totas et integras terras et baroniam de Little-

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" dean alias Maxtoun nuncupat. et burgum baroniæ ejusdem " nunc consisten. de et comprehenden. terras aliaque postea " mentionat: viz. totas et integras terras et villam de Maxtoun " cum domibus, ædificijs, *piscationibus*, et alijs partibus, pendi- " culis, et pertinen. quibuscunq., terris de Littledean contigue " adjacen uti Dominus Joannes Ker easdem possedebat vel ad " eas aliquando jus habuit. Et etiam totas et integras illas terras " de Maxtoun vulgo Rutherfurd's lands nuncupat. per quondam " Andream Ker de Littledean a quondam Joanne Comite de " Traquair conquest. et acquisit." &c. " Totas et integras tres " mercat. terras terrarum ecclesiasticarum de Lessudden vulgo " terras de St. Boswells nuncupat. cum earund. *piscationibus super* " *aquam de Tweed usitat. et consuet.* cum decimis garbalibus " earund. inclusis quæ nunquam a stirpe separari solebant, cum " earund. pertinen. Totas et integras terras ecclesiasticas cum " glebâ et mansione vicariæ de Maxtoun, cum domibus, ædificijs, " hortis, toftis, croftis, et cum decimis garbalibus earund. inclu- " sis, extenden. ad duodecem acras et dimidium acræ terræ aut " eacirca, aliquando ad Jacobum Ker de Newbottle pertinen., " et per dict. quondam Dominium Joannem Ker ejusque " tenentes occupat. et possess. Totas et integras sedecem acras " terræ cum lie Burn Mill vulgo St Boswells Mill nuncupat. " cum domibus et terris molendinarijs, aquæductis et multuris " dict. molendini, et privilegijs ejusdem, aliquando ad vicariam " de Lessudden tanquam illius patrimonij partem pertinen., cum " domibus, ædificijs, toftis, croftis, et decimis garbalibus, earun- " dem inclusis, aliquando per dict. quondam Jacobum Ker " ejusq. tenentes occupat." &c. " Omnes dict. terras, sylvas, " piscationes, decimas, aliaq. supra scripta, una cum quibusdam " alijs terris, alijsque uti expressis in antiquioribus juribus et " infeofamentis dict. terrarum aliorumque in unam liberam baro- " niam unit. baroniam de Littledean nuncupat."

The lands described in this Charter came by regular progress and were now vested in the Respondents.

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On the other hand, the interjected lands of Maxton or Govan's land had been granted to the Appellant's predecessor in 1742, by a Crown Charter, which described them as "Totum et integrum justum et æquale dimidium viginti mercat. "terrarum de Maxton vocat Govan's lands, cum nemoribus "molendinis piscationibus, tenentibus, tenendriis, libereq. tenen- "tium servitijs omnibusq. suis pertinen." and these lands had come by progress, and were now vested in the Appellant.

In the year 1844 the Respondents presented a note of suspension and interdict to the Court of Session against the Appellant, praying to have him, and all acting under his authority, interdicted from fishing for salmon on the south side of the River Tweed, from a point being the western boundary of their lands, to a point being the eastern boundary of the Appellant's lands, or the western boundary of the lands bought by Scott of Harden, in 1799. An interim interdict was granted on this note.

At the same time the Respondents brought an action of declarator against the Appellant, by the summons in which, upon an allegation "That by their titles the Pursuers are infeft "in the lands and barony of Littledean, with the pertinents "and the fishings in the River Tweed, used and wont, and they "and their predecessors have, from time immemorial, and for "a period greatly exceeding forty years, exercised the exclusive "right of fishing for salmon grilse, and trout by net and coble, "net and cairn, rod and spear, and every other legal method, "*ex adverso* of the whole lands on the south side of the River "Tweed, from the western boundary of the lands belonging "to the Pursuers, to the western boundary of the lands which "belonged to Mr. Scott of Harden, afterwards Lord Polwarth, "including the fishings opposite the lands of the Defender, "the Duke of Roxburgh, which lie interjected between the "eastern boundary of the Pursuers' and the western boundary "of Lord Polwarth's lands:" they concluded to have it declared

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that they had "the sole and exclusive right of fishing for "salmon grilse or salmon trout by net and coble, net and cairn, "and every other legal mode, on the south or Roxburghshire "side of the River Tweed," between the points mentioned in the prayer of their suspension and interdict, including therein the fishings opposite the interjected lands of the Appellant; and they further concluded to have it found that the Appellant had no right or title, by himself or those authorized by him, to fish for salmon grilse or salmon trout within the bounds before specified, and that he ought to be decerned to desist from so doing for the future, and from disturbing the Respondents in the possession and enjoyment of their right.

The Appellant pleaded, in defence to these actions, which were conjoined together—

"I. The Pursuers have no sufficient title to warrant them "to pursue the present action, in respect—1. That their titles "contain no grant of salmon-fishing; and, 2. That they have "had no possession sufficient, either in character or continu-"ance, to support a title otherwise defective.

"II. Especially the Pursuers have no title sufficient to "warrant possession of salmon-fishing *ex adverso* of lands of "the Defender; and any possession which they have had was "illegal, and therefore incapable of founding a prescriptive right.

"III. The title of the Defender to the fishings, *ex adverso* "of his own lands, is preferable in competition with that of "the Pursuers.

"IV. It is *jus tertii* to the Pursuers to plead, that the "Defender has no sufficient right of salmon-fishing by his "titles, in respect that they themselves hold no grant of fishings "*ex adverso* of the Defender's lands."

The case was sent for trial by jury upon the following issue:—

"It being admitted that the Pursuers are proprietors of "certain lands lying on or near the south bank of the River

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" Tweed, with fishings, as described in the Charter in favour of " Walter Ker, No. 5 of process, and subsequent titles,

" Whether the Pursuers, and their predecessors and authors, "have, by themselves, or others authorized by them, exercised " and possessed the salmon-fishings on the south side of the " River Tweed, opposite to the Defender's lands of Maxton, " called Govan's land, or any part thereof, for forty years prior " to 23d February, 1844, continuously and together, peaceably, " and without lawful interruption therein?"

Upon the trial of this issue the Respondents produced a tack granted by J. S. Ker in 1770, for 21 years, from 1765, to W. Spence, of the lands of Craigover (being part of those in question), " and salmon-fishing upon the River Tweed" for a money payment, " together, also, with twelve good clean salmon, or " kain fish, or one shilling sterling for each undelivered one " thereof." And another tack by J. S. Ker, in 1791, to J. Wight for 21 years, from the date of entry, of the same lands of Craigover, " with the salmon-fishings of Craigover upon " Tweed, belonging to the said John S. Ker," the entry being declared to be Whitsunday, 1790, " as to the houses, grass, and " pasture and salmon-fishing."

The Respondents likewise produced a copy of the Articles of Roup, under which the sale in 1799 had taken place, and in which Lot 1, purchased by Scott of Harden, was described as including *inter alia*, " the lands of Craigover and fishings on " the river of Tweed, presently possessed by John Wight, " tenant therein," and in which Lot 2 was described as including *inter alia*, " the fishing on Tweed effeiring to the lands contained " in this lot, but burdened always with the current tack of said " fishings to the said John Wight, present tenant thereof, and " to the rent whereof, during the subsistence of the said tack, " the purchaser of Lot 1st is to have right, but no longer."

The Respondents also adduced the evidence of S. Spence, the son of W. Spence, the lessee under the tack of 1790, who

swore to his father having fished under the tack between bounds, which included the Appellant's lands; that Ker was his "father's "landlord in fishings, and the Duke made no claim at all." The witness continued; "My father fished sometimes with rod, "sometimes with nets, and sometimes at night with lights and "leister. When with nets, he had them set at the cairns. The "cairns were built, and nets were set into the cairns. The cairns "were upon the banks, and went into the river. Were "built at conveniency (*i. e.* convenient places). The cairn was "on the Duke of Roxburgh's lands. No other cairn in father's "time. My father fished whole of water on south side.

"The Duke of Roxburgh or his people did not fish. "Squire Ker's son used to fish. He was my father's only "landlord. John Wight succeeded my father as tenant.

"The nets were set when water was big, in time of speats. "The nets were made fast. Allowed to remain as long as con- "venient, as water was big. Drawn occassionally. Remained "for two or three hours, and for nights. Were fixed with ropes "to cairns. I used sometimes to row the boat, and lights at "night. We did not use nets in any other way than that "described."

Haliburton, the tenant of the neighbouring fishing during Wight's tenancy of that in question, swore as follows:

"I lived at Maxton for some time. I went there in 1810. "I remained 11 years there. I had all Lord Polwarth's fish- "ings. John Wight was tenant of General Ker's water.

"Wight fished by nets, rod, and whiles by leister. Nets "were cairn-nets.

"Cairn-net is a small net, eight or nine or ten yards long, as "answers hole. It is putten up with floats on top, and sinks below. "Cairn is built on bank. The net will not do without it. It pro- "jects from bank into river. Makes an eddy, which keeps net "bent out into water. Net is fixed to middle of cairn at top, by a "pin and rope; object of rope is to bring the end of the net close

" to the cairn. The net is thrown out, and the water arranges " it. The off-end goes loose; but from eddy and stream it keeps " a stationary position. Is in dead water between stream and " eddy. The net has bags at both ends. It remained generally " all night; but was looked at, or drawn once at night. Fish " came up by side of cairn in easy water, and then, rounding the " cairn, got into the net. We drew them once or twice, or oftener " in a night. We caught many when water was in order for " these nets; that is, large; four or five caught in one haul, and " several hauls in course of night.

" Wight fished in this way. He had seven cairns or eight " on whole water, and nets for each. Three cairns were on " Duke's lands: uppermost at Kirkback, just below church; " next at east above Webb's; and third at Webb's. The cairn " there was rather in the water, called in-water cairn; but other " two on bank. Wight fished at these three cairns."

Robert Kyle, besides confirming the above evidence, swore: " Water cannot be fished with long net. The channel too rocky." " Cairn-nets was the only way of fishing when water is heavy " and fish were travelling. This mode is common."

John Moffat sworn.—" No one, in right of the Duke, " ever fished there, even with rod, no one fished without leave " of the ladies," meaning the Respondents. " We stopped all." This evidence was also corroborated by other witnesses. And continuous fishing, in the manner described, was proved down to the year 1842.

Upon this evidence the Jury returned a verdict for the Respondents, " subject to the opinion of the Court whether, " in point of law, the mode of fishing proved is sufficient to " support the issue."

The Court, on hearing parties, *vivâ voce*, pronounced the following interlocutor—"Apply the verdict of the Jury in the " conjoined cases: In the process of suspension and interdict, " suspend the letters *simpliciter*, and declare the interdict per-

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" petual: And in the process of declarator, find and declare in " terms of the conclusions of the libel, and decern."

This interlocutor was the subject of the appeal.

Mr. Bethell and *Mr. H. J. Robertson* for the Appellant. Salmon-fishing, when it is carried on within sea-mark, or where the sea ebbs and flows, or where the fishing is with coble or trail net, is a *jus regale*, and requires express disposition to pass it, Leslie *v.* Ayton, *Mor.* 14249; Gairlies *v.* Torhouse, *Ibid.* If it be not so conveyed, it may be acquired under a charter of lands, accompanied by a forty years' possession; but in such a case the charter must either expressly give the fishings in the particular river, or bestow a general grant of fishings, for without a *prima facie* title, no length of possession will give the right, Hunter *v.* Maule, 5 *S. & D.* 222. In the present instance neither the possession nor the titles of the Respondents are such as to give them the right claimed.

The charters founded on give only a general grant "piscationum," not "piscationum salmonum," and that only of the fishings appurtenant to the lands conveyed—the grant is "*cum* "*earund. piscationibus.*" These expressions will not give the grantee any larger right than to the fishings of the particular lands; but here the claim asserted by the Respondents is not confined to the fishings, *ex adverso*, of their own lands, but extends to embrace those, *ex adverso* of the Appellant's lands, to the exclusion of any enjoyment by him, a claim for which the deeds offer no foundation. But even if the charters could be the basis of a prescriptive title to such a right, the nature of the fishing, whether of salmon or of white fish only, would have to be ascertained by the nature of the possession which had been enjoyed.

The only possession proved was fishing by cairns and cairn-nets, by rod, and by spear, and lights. With regard to the two last, they are not sufficient possession to support the

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right, as was long since found in Forbes *v.* Udney, *Mor.* 7813, and again in Chisholm *v.* Fraser, *Mor.* App. Sal. Fish., No. 1. Sutherland *v.* Ross, 14 *Sh.* 960. See also Abercrombie *v.* Breadalbane, 5 *Co. of Sess. Ca.* 1393.

The only other possession proved or founded on was that by means of cairns and cairn-nets, but that is a mode of fishing contrary to the general policy of the law, which will not allow any mode which, in its operation, is either destructive of the fish, or prevents their free passage up or down the river. Cruives and yairs are prohibited by 1424, cap. 11; 1427, cap. 6; 1429, cap. 22; 1477, cap. 73; 1489, cap. 15; 1563, cap. 68; and 1581, cap. 11. The Act 1457, cap. 86, prohibits any man to "set ony uther ingine to let *i. e.* hinder the schmoltes to go "to the sea." The Act 1469, cap. 37, re-enacted by 1685, cap. 20, forbids fishing in a variety of ways, "or any uther "manner of way," tending to the destruction of the fish, which has been found sufficient to authorize the prohibition of a mode of fishing which, though not mentioned in the statute, had the tendency to that destruction which it was the object of the statute to prevent. And notwithstanding it had been followed for upwards of forty years, Fife *v.* Gordon, *Mor.* Sal. Fish. App. p. 2. And the Act 1696, cap. 33, which prohibits the erection of mill-dams in salmon rivers, "discharges all "fishing at such miln-dam dykes with nets stented or other-"ways, or any other engines whatsoever." In Colquhoun *v.* Montrose, *Mor.* 12827, and 14283, fishing by stented nets and stakes stretching nearly across the mouth of a river, was held to be illegal, "being of a very destructive nature, and impos-"sible to be regulated in the manner of a cruive fishing, and "cannot be sanctioned by any usage." In Queensberry *v.* Annandale, *Mor.* 14729, the Court prohibited particular modes of fishing, because they were intended for "preventing or "obstructing the fish from passing up the river, and are not "only prejudicial to the superior heritors, but destructive of

"the fishing." And in Dirom *v.* Little, *Mor.* 14282, the Court prohibited the Defenders "from erecting any engines, or using "any method not for the purpose of catching fish, but for "obstructing or preventing them from passing up the river, "and in particular from using the stent-nets, or hang-nets of "any sort or denomination," although the mode complained of had been used from time immemorial. In Atholl *v.* Wedderburn, 5 *S.* & *D.* 150 the Court interdicted fishing "by any "other than the ordinary way of net and coble;" so also in Grey *v.* Sime, &c. 13 *S.* & *D.*, 1089, fishing by nets, having one end fastened to the shore, and the other moored in the water, was interdicted.

In all of these cases fishing by any other mode than net and coble was interdicted upon the general principles laid down in Atholl *v.* Maule, 5 *Dow.*, that at common law, upper proprietors are entitled to prevent operations by lower heritors tending to obstruct the progress of the fish, and that the statutes were intended not merely to preserve the breed of young salmon, but to prevent excessive destruction of the fish generally. Accordingly, in Sime *v.* Johnstone, the interdict was against using nets made fast to the shore by one end, and having the other fixed by a mooring in the river and remaining stationary, "so as to obstruct the passage of salmon, and force or decoy "them into courts or inclosures of netting, within which they "are caught," and with a view best to insure the object of the law, it was assumed that any other mode of fishing than by net and coble was illegal.

But the mode of fishing practised by the Respondents is in direct opposition to the statutory enactments and to the decisions of the Courts, for the cairn is built on the bank running out into the stream, and the net is attached to the end of the cairn, and is thence drawn out into and allowed to hang in the stream, and so effectually interrupts the passage of all fish to the extent to which the net protrudes into the river.

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Such being the general principles and policy of the law in regard to the fishing for salmon in the rivers of Scotland generally, there is nothing which makes the River Tweed an exception. In all the earlier statutes down to 1597, the enactments are general in their terms, not mentioning, and still less excepting the Tweed. No doubt in the Acts 1597, cap. 265, and 1600, cap. 11, probably from deference by King James to Queen Elizabeth, the River Tweed was excepted from their provisions, but that exception was taken away by the Act 1606, cap. 5, and thenceforth the Tweed was under the same statutory regulation as the other rivers of Scotland. That this is the case is established by express decision in Roxburgh *v.* Home and Tankerville, 1 *Haile*, 249, in which case this House found that the Act 1696, cap. 33, applied to the River Tweed, where both its banks were within Scotland, and also to one half of its channel, when one bank alone was within that country.

But it is said the Act of 11 Geo. IV & 1 Will. IV., cap. 54 does, by implication, give authority for the mode of fishing in question, a consequence which would hardly be anticipated, and which a Court will be very unwilling to draw, inasmuch as it will be in direct opposition to all previous legislation or jurisprudence upon the subject.

That statute, in its 10th sect., enacts,

"And be it further enacted, that from and after the passing "of this Act, if any person or persons shall beat the water, or "place, or set any white object, or any bar-nets, or other net or "nets, or other thing whatsoever, in, over, or across the said "River Tweed, or in, over, or across any river, rivulet, brook, or "stream, mill-pool, mill-lead, mill-dam, sluice, cut, pord, or "other pool which runs into, or otherwise communicates with "the said River Tweed, or within the mouth or entrance of the "said River Tweed, so as to prevent, or for the purpose of pre-"venting the said fish from entering the said River Tweed, or "from going up and down the said river, or any river, rivulet,

"brook, or stream, mill-pool, mill-lead, mill-dam, sluice, cut, "pond, or other pool, which runs into or otherwise communi- "cates with the said River Tweed, or shall in any other way, or "in any other manner, prevent the said fish from entering the "said river, and going up and down the said rivers and waters "before-described, every person so offending shall, for the first "offence, forfeit and pay any sum not less than 10*l.* and not "exceeding 20*l.*; and any sum not less than 20*l.* and not "exceeding 40*l.*, for every subsequent offence: Provided always, "and be it further enacted, that nothing herein contained shall "be deemed or construed to alter or affect the modes or "methods for taking and killing fish in the said rivers and "waters, other than such as are by this Act specially pro- "hibited."

Now, nothing can be plainer than that this statute prohibits the setting of any net "in, over, or across the said River Tweed," "so as to prevent, or for the purpose of preventing the fish "from going up and down the said river," except that a cairn-net, used in the mode proved in this case, is a net "set in the "river," which "prevents," or is placed "for the purpose of pre- "venting the fish from going up or down the river." And if the statute had stopped there, the question would be at an end.

But the statute, in its 26th sect., enacts.

"That it shall not be lawful for any person or persons to "affix any net, commonly called a cairn-net, to any islet or "cairn, not connected with, or adjoining to, the banks of any "of the said rivers or streams, nor to build any cairn in any "part of any such river or stream, which cairn shall not adjoin "the bank thereof; and any person or persons found guilty of "any such offence, shall forfeit a sum not less than 1*l.* and not "exceeding 10*l.* for the first offence; and not less than 2*l.* and "not exceeding 20*l.* for every subsequent offence, besides "forfeiture of any such net or nets so placed or set."

And this, it is said, by prohibiting nets to be affixed to any

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cairn *not* connected with the bank, by implication authorises the affixing such a net to a cairn which *is* connected with the bank. But that is a very violent reading of the statute. The mode of fishing in question is opposed to the policy of the law and to the express terms of the older statutes as applied to the other rivers of Scotland. There is no repeal of these statutes in this Act, and the words of the 10th sect. are quite broad enough to prohibit this particular mode of fishing in the Tweed, assuming the previous statutes and decisions not to have had that effect; the terms of this 10th sect. and the general law cannot be set at nought then, because the 26th sect., while it does not legalise the particular mode of fishing, declares another mode, viz., by nets affixed to cairns erected *in* the stream to be illegal; all that the 26th sect. had in view was *ob majorem cautelam*, to declare illegal by itself and to impose a specific penalty, upon a particular mode of fishing, which is more injurious and more opposed to the policy of the law than the other modes which would be embraced by the general expressions used in the 10th sect., including among them the mode of fishing, viz., by cairns erected *on* the banks of the river.

But even if it were to be conceded that the 26th section of this statute did legalize by implication the fishing from cairns upon the banks, still that mode of fishing having been illegal prior to the statute, the position of the Respondents would be but little advanced, for the operation of the statute could not draw back to legalize that which had previously been illegal. The possession of the Respondents, then, till the passing of the statute, would have been according to a mode not permitted by law, and their possession by a legal mode would be confined to fourteen years, viz., to the period since the passing of the statute; but possession by an illegal mode is no foundation of a prescriptive title, and possession for fourteen years by a legal mode is insufficient as to length of time. The result then is, that the mode of fishing practised by the Respondents and their authors has

been either insufficient in degree to give the character of possession, or illegal in its mode, and that there is nothing which can raise up their title to *fishings* only into a right to *salmon* fishing.

Mr. Rolt and *Mr. Anderson* for the Respondents.—It is too clear to admit of dispute that a Crown Charter *cum piscationibus* is a sufficient foundation for a title to salmon-fishing by prescriptive possession of forty years, *Ersk.* II, 6, 15, even against a grantee of the salmon-fishing by express disposition not followed by possession, Queensberry *v.* Stormont, *Mor.* 14251. In the present case the Appellant neither has a grant of the salmon-fishing *ex adverso* of his lands, nor pretends that he ever possessed the fishing.

The question, then, is truly one of possession alone. The length and extent of the possession is not disputed, but the point made is, that the possession was illegal as to its mode, and therefore cannot give a title; but however noxious a possession may be, it is not the less possession. In the present instance the complaint is, that the possession is too ample—that it shows too large possession—but that can never be reduced to no possession at all. The possession may be illegal and may be put an end to in proceedings properly constituted for that purpose, but until so interrupted, the party is entitled to continue the possession, and to draw every advantage which may be consequent upon the fact of its subsistence. It is not declarator of a right to fish by cairn and net alone which the Respondents ask, but of fishing by that "and every other legal "method." If fishing by cairn and net be illegal in the Tweed it may very well be that the illegality will prevent the continuance of that particular mode, and yet its past exercise may constitute such a possession as will give the party a right to declarator of a title to be enjoyed hereafter by some other legal mode. At all events, as the Appellant does not allege any

possession by himself of the fishing in question, he has no title to complain of the illegality of the mode of fishing used by the Respondents, *Chisholme Mor. Appx. Salmon-Fishings; Munro*, 7 *Co. of Sess. Cases*, 358; Sutherland *v.* Gilchrist, 14 *Sh.* 960.

But fishing by cairn and net neither comes within the policy of the restrictions upon the mode of salmon-fishing generally, nor is it expressly prohibited by any statute. The policy of the legislation upon this subject has been to prevent obstruction to the free passage of the fish, and their undue destruction by means of fixed machinery or apparatus, but the evidence in the present case shows that the cairns used are not built in the bed of the river, and do not extend into it, but are erected upon the bank, while the net stretched from them does not exceed 30 feet in length, the river being more than 100 feet broad. Such a contrivance is not within the letter of the old statutes, and is not, except to a very small degree, if at all, opposed to the policy of the legislature, while on the other hand it is proved that fishing by net and coble, the acknowledged legal mode, is impossible at this part of the Tweed by reason of the rapidity of the current.

Further, the Tweed, together with the Solway, are in a different category from the other rivers of Scotland. These two rivers were expressly excepted from the general statutory enactments for the protection of the fish, for an obvious reason, viz., that their course running partly between England and Scotland, it was not possible, while the two kingdoms remained separate, so to devise a restriction upon the course of fishing in them as that, while the inhabitants on the Scotch bank observed the restriction, those on the English bank should do so likewise; and therefore, as the likely effect of any restriction would be to benefit the English at the expense of the Scotch, it was thought better to except the Tweed and the Solway, or Annan, from the enactments passed from time to time. There

is an express exception to this effect in the Acts 1431, cap. 131; 1457, cap. 85, and 1597, cap. 265, and the whole scope of the other Acts shows that it was not intended to apply to the Tweed and Solway the regulations which were made for the other rivers, but that the mode of fishing in these two rivers was left to use and possession.

Accordingly, the 9th of Geo. IV. cap. 39, which for the most part superseded all the ancient statutes upon the subject of fishings in the rivers of Scotland generally, and put these fishings under a series of new regulations, contained, like the more ancient statutes, an express exception "of the fisheries in the River Tweed."

It was not until some time after the kingdoms had been united, that the fisheries in the Tweed became the subject of legislation. In 1771 an entirely new course of legislation commenced, which in its terms was confined exclusively to the Tweed, viz., 11 Geo. III. cap. 27; 15 Geo. III. cap. 46; 37 Geo. III. cap. 48, 47 Geo. III. cap. 29. None of these Acts refer to the Scotch Acts as applying to the River Tweed, and in none of them is fishing by cairn and net in that river declared to be illegal. On the other hand, the evidence in the present case shows that that mode of fishing has been practised in the Tweed for time immemorial, and has been recognized as lawful by the decisions of the Court. In Scott *v.* Kerse, 11 Dec. 1812, F. C., the mode of fishing there complained of was by cairn and net, and the complaint was dismissed. So in an action in 1814, at the instance of the Respondent's author, Ramsay against Lord Polwarth, the successor of Scott of Harden, for the purpose of having the right to the fishing now in question established against his Lordship, (the decree in which was produced in the Court below,) the mode of possession proved and not objected to as illegal was by cairn and net.

Fishing by cairn and net having thus been practised for time immemorial in the Tweed, the statutes applicable to other

rivers not having application to the Tweed, and the statutes expressly applicable to the Tweed not forbidding the practice: then come the 11 Geo. IV., and 1 Will. IV., the last and governing statutes in regard to the Tweed. That Act, in its 16th sect. declares that if "any net or engine or device whatso-"ever" shall be left "or placed *in* the said river," during the close time, with the intent of taking salmon (which intention with respect to nets shall be implied "from their being left "or placed during the said close time in the state in which "such nets are ordinarily used," in fishing), it shall be lawful for the water-bailiff to seize and burn the same.

These expressions assume the existence of modes of fishing by fixed nets of some kind or other; and then comes the 26th section, which prohibits fishing by cairns "not connected with "or adjoining to the banks." It declares this mode of fishing as for the first time to be unlawful, and prohibits it under a penalty. The obvious inference is, that the other mode of fishing from cairns, viz., from those which *are* connected with and adjoining to the banks, as it is not declared to be unlawful, though known to exist, is permitted to continue, and is considered to be lawful, more especially as the 10th section declares that it should not be deemed to affect the modes of fishing in the river, "other than such as are by this Act specially pro-"hibited."

With regard to the reported cases, they are all applicable to other rivers than the Tweed. In Fife *v.* Gordon, *Mor. App. Sal. Fishery;* Colquhoun *v.* Montrose, *Mor.* 14283; Queensberry *v.* Annandale, *Mor.* 14,279; Dirom *v.* Little, *Mor.* 14282; and Forbes *v.* Smith, *Wils. & Sh.* 583, the question was as to the legality of erections either within or stretching across the river. In Athol *v.* Wedderburn, 5 *S. & D.*, 153, and Gray *v.* Seine, 13 *D. & B.*, 1089, the question regarded the use of particular kinds of nets in the river Tay, but neither in these nor in the other cases was any question raised about cairn-nets,

or was it proved that the use of net and coble was impossible, as it is in the present case.

Mr. Bethell, in reply.—The prohibition of this particular mode of fishing is part of the general law, and there is no exception of the Tweed from its operation. The object of the 11 Geo. IV. and 1 Will. IV. was *ex abundanti cautela,* to make illegal, *per expressum,* a practice which up to that time had not been regarded in that light, to abolish that which fell within the reason, but might be said not to fall within the letter of the law. Scott *v.* Kerse is only an authority for saying that the mode of fishing complained of did not fall within the particular statute under which the complaint was made, and that Commissioners for enforcing a statute were not entitled to complain of any thing not within the statute.

[*Lord Brougham.*—If previous statutes declare a thing to be illegal, and a new Act imposes a penalty upon the doing of one of the things that won't take away the illegality of doing the other things. But that is not this case. The Act of 1830, as if for the first time, makes cairn-nets fixed in islets to be illegal, and imposes a penalty, saying nothing of cairns upon the banks.]

Cairns connected with the banks were already illegal, and the 10th sect. continues the illegality by prohibiting the setting of any net in, over, or across the river.

LORD BROUGHAM.—My Lords, In this case I shall not ask your Lordships to give judgment at once, because there are one or two things which I wish more fully to look into than I have had an opportunity of doing either formerly or during the course of the argument at the bar.

The interlocutor under appeal is apparently, no doubt, the unanimous decision of all the four Judges who dealt with the cause. But when you come to look at it more nearly, there is a considerable difference in the manner in which their Lord-

ships give their opinion, a circumstance always tending very much to make the Court in the last resort give particular consideration to the arguments adduced. One of the learned Judges, Lord Medwyn, states, in what may be considered a modest form of expression, that which, perhaps, hardly amounts to a clear and decided opinion either way; it rather leans for the Appellant than against him, and it leaves a doubt on our mind whether he can be said to have agreed with the learned Judge who preceded him, the Lord Justice Clerk; for the reason I have already stated in the course of the argument, it should seem that Lord Medwyn does not meet the reasons urged, at least chiefly argued, by the parties.

But much is to be said upon the connection between the 10th section and the 26th section of the 11 Geo. IV, chap. 54, and it is with the view principally of considering these that I recommend to your Lordships the allowing time for moving the judgment. If the 10th section must be regarded as incapable of any other construction than that put upon it by the learned Counsel; and if the 26th section is capable of no other construction (and indeed I doubt whether any other construction can be put upon the 26th section), I must say, of all the inartificial pieces of legislation I have ever had occasion to see, this is the most inartificial; for it is hardly possible that these two sections can stand together if the construction contended for by Mr. Bethell in the latter part of his reply be the pure one. The 26th section declares, under a penalty, a certain kind of dealing with nets to be unlawful, namely, putting them "in the river," that is, upon the bed of the river; and it adds, "and not "adjoining the land," so that plainly the subject-matter of the 26th section not only embraces principally nets upon islands and islets, but positively excludes nets upon the land, for it says "which cairn shall not adjoin the bank thereof." But then it is said that the 10th section makes it quite unnecessary to deal with that proceeding, because the 10th section had

already declared it to be illegal. Now, what does the 10th section say? I think that also is clumsily and inartificially framed, but I still conceive one can see what is meant, for it says, "And be it further enacted, that from and after the pass-"ing of this Act, if any person or persons shall beat the water "or place, or set any white object or any bar-nets, or other net "or nets, or other thing whatsoever." Then if the 26th section had not been here you would have said that this 10th included nets tied to any island or islet, as well as those tied to the shore. But what does the 10th say? Not only "over "or across," which would be sensible and consistent with the 26th section, for "over or across" by force of the terms means from shore to shore; but the words are "in, over or across "the said River Tweed" which shall tend to prevent the fish coming up. Now, is not a net in an island or islet something in the Tweed which has that tendency; and yet the one section deals with it in one way and the other in another? The 26th speaks upon that subject as if it had never been contemplated by anything going before.

I shall look fully into this point of construction, and also into the other arguments adduced, because I agree with the learned Counsel in thinking that the question is not at all an immaterial, but one of considerable importance; I therefore move your Lordships to postpone the further consideration of this case to a future day.

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LORD BROUGHAM,—My Lords, I have fully considered this case since the hearing. I have examined the statutes cited, and looked into the cases referred to, which do not, however, at all vary the opinion I formed during the argument upon the import of the statutes, and I am prepared to move your Lord-

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ships, without entering minutely into the argument, that the interlocutor appealed from be affirmed.

This was a judgment pronounced by four learned judges,—by two of them, Lord Moncrieff and Lord Cockburn, without any hesitation, by the Lord Justice Clerk, who, in addition to his observations, stated that it was a question of great nicety, and that he gave his opinion with hesitation; and by Lord Medwyn, upon the mistaken ground which is set forth in the course of his argument. He does more than merely express a doubt—he expresses a strong inclination of opinion respecting the construction of the Act as to legal modes of fishing, observing that prescription must be by user, and that it must be by a legal user. Spearing and rod fishing would not raise the point, but cairn fishing is the mode in question, and you must believe it to be a lawful user, or it will not form any ground of prescription. His Lordship thinks that, by the Tweed Act, 1830 (the 11th George IV.), cairn fishing is not recognized to be a legal mode of fishing. It is enacted by the 24th section, "That it shall not be lawful to affix any net, "commonly called a cairn-net, to any islet or cairn not con-"nected with, or adjoining to the banks of the said river," under a penalty. Now his Lordship says, the argument on this is that by stating one mode of fishing to be liable to a penalty, the Legislature tacitly admitted, though not by words, that another mode of fishing, not declared to be subject to a penalty was legal—"that this is implied in the prohibition of doing it "(that is, fixing the cairn-net) to cairns not connected with the "bank, which clearly was illegal before. But is this so? To "set cairn-nets in the Tweed is unlawful. A statute is passed, "imposing a penalty upon them in a particular situation, "where we may suppose they are peculiarly destructive, and "giving a convenient jurisdiction for enforcing it, does this at "once legalise them in all other positions in the river, which "are not so much as noticed from one end of the statute to the

"other?" I take leave, with great and unfeigned respect for that very learned judge, to say that such is really not the argument, nor the accurate statement of what the 24th section of the statute enacts. If all that the 24th section did had been to say,—Whoever affixes a net to an islet, or to a part of the land in the bed of the river not adjoining to the side, shall pay a penalty, I should entirely have agreed with his Lordship that this would be only affixing a penalty to a particular act, and would not show that any act other than that against which the penalty was denounced, was legal. But that is not what the statute does. The 26th section says, "That it shall not be "lawful for any person or persons to place"—what?—"to "place or set any net or nets nearer than 50 yards above or "below any dam-dyke," and so on, "or to affix any net, com- "monly called a cairn-net, to any islet or cairn not connected "with, or adjoining to the banks of any of the said rivers or "streams, nor to build any cairn in any part of any such river "or stream, which cairn:" it does not say not to build any cairn at all in any part of it—no such thing—it shall not be lawful "to build any cairn in any part of any such river or stream, "which cairn shall not adjoin the bank thereof." The intention is perfectly clear. It is under a penalty, no doubt. But this is not merely affixing a penalty to that which was declared illegal before; it is declaring its illegality; it is constituting its illegality; it is creating its illegality; it is creating an illegality of a new description, and that illegality is confined to the building of a cairn upon an islet, or some part of the channel of the river, "which cairn shall not adjoin the bank thereof." I formerly, at the hearing pointed out the use of the word "in" by the 10th section as strongly supporting this view of it, and therefore I take leave to think that my Lord Medwyn is in error in the comment which he makes upon the argument arising on the statute. In all sound construction of statutory provisions, declaring an illegality rather than dealing with a penalty, we are to take the

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rule which his Lordship does not adopt, from, I think, not duly regarding the object and frame of the enactment.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellant do pay or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs, as shall be lawful and necessary.

RICHARDSON, CONNELL, and LOCH—GRAHAME, WEEMS, and GRAHAME.

[HEARD and JUDGMENT *3rd August*, 1850.]

THE CALEDONIAN RAILWAY COMPANY and OTHERS, Directors of the Company, *Appellants.*

JAMES HAMILTON of Kames, with consent of JAMES MCINNES, with concourse of His MAJESTY'S ADVOCATE, *Respondent.*

Interdict.—An interdict against interference with property must be obeyed until it is recalled, and a breach of it will not be justified by proceedings taken by the party interdicted, which in his opinion had transferred the property to himself.

Ibid.—Jurisdiction.—The Court of Session has power to punish any breach of its interdict by fine, with the view of punishment of the breach as a contempt of Court, but in imposing the fine, regard should be had to the motives of the party complained against.

IN the month of February, 1847, the Respondent presented a note of suspension and interdict against the Appellants, setting forth that they, by their contractors and workmen, had entered upon his property, pulled down some houses upon it, and commenced cutting a road through it, although no notice had been served upon him by the Appellants, either prior to, or after obtaining the Act under which they were constituted, and praying the Court "to suspend the proceedings complained of, "and to interdict, prohibit, and discharge the said Respondents "*from further entering upon the complainer's plot* of ground in "the town of Crawford, as lately possessed by David Murray, "as tenant, referred to in the annexed Statement of Facts, for "which he has not had any notice as proprietor, either previous "to the said Respondents applying for their Act of Parliament, "nor scheduled by the said Company in any notice under the

" said Act of Parliament, as being required for the purposes " of the said railway: or *from proceeding with their works in* " *progress* through said piece of ground belonging to the Com- " plainer; or to do otherwise in the premises, as to your Lord- " ships shall seem proper."

After some proceedings in the Bill Chamber, not necessary to be noticed, the Lord Ordinary, on the 6th March, pronounced the following interlocutor:—" In respect of the titles in favour " of the Complainer exhibited at the Bar, and admitted to have " been delivered yesterday by one of the Agents of the Railway " Company who had possession of the same as agent for Mr. " McInnes, trustee of Mr. Hamilton; in respect the Complainer " is not scheduled under the statute as proprietor of the lands " in question, and that no notice under the said statute was even " given him thereanent; in respect no title to the lands is alleged " by the Railway Company to have been acquired by them from " any person whatever, and that it is admitted at the Bar that " no price was paid to David Murray or any other person there- " for; and in respect there is no evidence of the Suspender " having given possession of the land in question to the Railway " Company, and that he avers he has been in possession thereof " through his tenants or otherwise since the date of his title in " 1810; passes the note, and grants the interdict as craved."

The Appellants presented a reclaiming note against this interlocutor, but having permitted the statutory period for doing so to elapse, they were unable to proceed upon it. The Appellants, then, on the 23rd and 31st of March, served notices upon the Respondent under the 7th section of the Railways Clauses Consolidation Act, that they intended to apply to the Sheriff to correct the Books of Reference. On expiry of this notice, they presented such an application; setting forth that in consequence of representations by the Respondent that Nos. 176 and 177 on the plan of the railway, of which numbers David Murray was entered as the owner, truly belonged to him.

They craved the Sheriff to correct the Book of Reference, and to grant a certificate that David Murray or James Hamilton, or James McInnes, trustee for his creditors, were owners or reputed owners of the subjects. On the 12th of April the Sheriff authorized the correction, and granted the certificate asked.

On the 20th of April the Respondents further served a notice upon the Respondent under the Lands Clauses Consolidation Act, to the effect that Nos. 176 and 177 on the railway plan would be required by them, and that they were ready to treat with him for the purchase, and that, if within 21 days a treaty were not entered upon, the compensation would be ascertained in the manner provided by the statute.

The Respondent lodged formal objections to this notice, one of them being that the matter was *sub judice* in the Court of Session, by the application for interdict.

Without abiding the result of this proceeding, the Appellants, under the 84th sect. of the Lands Clauses Consolidation Act, presented an application to the Sheriff, on the 12th of April, praying him to nominate a valuator of the ground in question. The Sheriff granted the prayer. The valuator appointed by him valued the ground at 60*l*. The Appellants deposited that sum in the bank, and at the same time granted bond for a like amount to the satisfaction of the Sheriff.

Assuming that these proceedings had vested the property of the land in themselves, the Appellants resumed their operations, in disregard of the interdict which had been granted, and formed through the land a road, in substitution for a high road which they had stopped up by the course of their railway.

The Respondent thereupon presented a petition and complaint against the Appellants and Stephenson, the contractor by whom their operations had been carried on, by which he prayed the Court to find that the Appellants had acted illegally, and been guilty of a breach and violation of the interdict

granted by the Court, and a gross contempt of its authority, and to inflict such punishment by imprisonment, fine, or otherwise, as might be considered necessary.

The Appellants in their answer to this petition, stated the course they had followed, and concluded their answer in these terms.

"The Respondents desire, in conclusion, to state, that in "what they have done, they were very far indeed from intend- "ing anything like disrespect to the Court. They know well "that all subjects of this realm are bound to obey the orders "of your Lordships, no matter at what expense or risk, and "no matter how vexatious and unjust the conduct of the "party holding an interdict may be. But they were humbly "of opinion, and now respectfully, but confidently, submit to "your Lordships, that the recent operations of the Railway "Company having been made under a good statutory warrant "and title, it is impossible to construe these to be a breach of "interdict granted under totally different circumstances, when "the Respondents held no such warrant or title."

On the 20th of July, 1847, the Court pronounced the following interlocutor upon the petition and complaint.

"The Lords having advised the petition and complaint of "James Hamilton, Esq., with answers for the Caledonian Rail- "way Company, and John Stephenson, and heard Counsel for "the parties, find that a breach of interdict has been committed "by the Caledonian Railway Company as to the ground said to "have been acquired under the proceedings before the Sheriff, "by their operations since the 18th day of May last, and there- "fore fine and amerciate the said Caledonian Railway Company, "and John James Hope Johnstone, Esq. of Annandale, M.P.; "Robert Johnstone Douglas, Esq. of Lockerbie; John Ander- "son, Esq. merchant, Glasgow; Alexander Hastie, Esq. Lord "Provost of Glasgow; John Houldsworth, Esq. of Cranstoun "Hill, merchant, Glasgow; William Lockhart, Esq. of Milton

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" Lockhart, M.P.; William Macdonald, Esq. of Powderhall;
" John Masterman, jun. banker, London; Charles Murray
" Barstow, Esq. accountant in Edinburgh; David Dickson,
" Esq. of Hartree; James Seton Wightman, Esq. of Courance:
" Henry Monteith, Esq. younger, of Carstairs; T.
" Hodgson Hinde, Esq. of , M.P.; Humfrey Ewing
" Crum, Esq. merchant, Glasgow; and the Right Honourable
" Fox Maule, M.P., the Directors of the said Company, and
" David Rankine, Esq. Treasurer of the said Company, in a
" fine of 300*l.* to the Queen; and authorize and empower the
" proper officer in Exchequer to levy and recover the said fine
" from the said Respondents, the Caledonian Railway Company,
" and the Directors and Treasurer of the said Company: find
" the petitioner entitled to the expenses incurred by him; allow
" an account thereof to be given in, and remit to the auditor to
" tax the same, and to report. But in respect of the statements
" contained in the said answers, and also in an incidental peti-
" tion now given in to the Court, as to the proceedings alleged
" by the said Respondents to have been duly adopted by them
" under the Railway Clauses and Lands Clauses' Consolidation
" (Scotland) Acts, in order to acquire, and by which they aver
" they have acquired, a good right of property to the subjects
" in question, and a right of entry to the same, whereby the
" right and title of the Complainer is said no longer to subsist,
" in respect of which the interdict was granted, the Lords remit
" the said petition to the Lord Ordinary on the Bills in vacation,
" to hear parties thereon; and if he shall see good cause for
" doing so, in respect of any right of property and title of entry
" acquired by the Respondents, with power to recall the said
" interdict, or to authorize the Respondents to proceed with
" the construction of their works in the meantime.

Mr. Rolt and *Mr. Anderson*, for the Appellants.

Mr. Bethell and *Mr. A. McNeill*, for the Respondent.

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LORD BROUGHAM.—My Lords, this is a case of importance in some respects; but in my opinion it is without any difficulty whatever. I think to some extent the Court below has miscarried; but with respect to the matter first insisted upon by the Appellants, I am disposed to agree with their Lordships, and for the following reasons.

An interdict was applied for and obtained; and that interdict, the Appellants contend, was to prohibit them, the Company, from doing certain acts upon a piece of ground, the property of the original Respondent, Mr. Hamilton, now deceased. Therefore, as the interlocutor of the Lord Ordinary "grants the interdict as craved," we are carried back to look at what is craved, the contention of the Appellants being (and the case, as regards the Respondent, turns upon this point), that the interdict was to prohibit the doing of certain things upon ground now the property of the Appellants themselves.

Mr. Hamilton, in his petition, upon which the interlocutor was pronounced, prays "to suspend the proceedings complained "of, and to interdict, prohibit, and discharge the said "Respondents from further entering upon the Complainer's "plot of ground in the town of Crawford, as lately possessed "by David Murray as tenant, referred to in the annexed state-"ment of facts." And, referring to the second part of the annexed statement of facts, we find that he first sets forth that he is the proprietor of "two freedoms of the commonty lands "of Crawford," lying in the parish of Crawford, in the county of Lanark. Then comes a more particular specification of his property, in section second of the statement, there being several plots—one in the possession of Marion Weir, as tenant; and another in the possession of William and Alexander Cranstoun, innkeepers in Crawford, as tenants; "and further, a plot of "ground," the plot in question, "extending to half an acre of "ground, or thereby, with the houses built thereon, till lately "possessed by David Murray, innkeeper in Crawford, as

"tenant." That is the part which is referred to in the prayer of the petition for the interdict, because that prayer says, "the "Complainer's plot of ground in the town of Crawford, as "lately possessed by David Murray as tenant." Therefore, I look upon this as descriptive of the plot of ground, and I consider the interdict as levelled against proceeding to enter upon that plot of ground, the property of Mr. Hamilton, though the order does not state so, but only grants the interdict as craved. The craving, no doubt, is to prohibit the thing being done upon a plot of ground the property of the Petitioner, but that is not the description given;—the Petitioner's property is set forth as being a "plot of ground in the town of Crawford, as lately "possessed by David Murray as tenant" thereof. Therefore it is merely as if the interdict had said in so many words, "You "are hereby forbidden to carry your works on upon a certain "plot of ground in the parish of Crawford, in the possession of "David Murray, as tenant thereof to James Hamilton, the "Petitioner, the proprietor thereof." It is a mere description of that plot of ground on which the works are forbidden by the interdict to be carried on. The plot is identified, not by the mere mention of the property being in Mr. Hamilton, but by the parish and the late tenant also being named.

Then it was the duty of all parties thus prohibited, to abstain from carrying on their works upon that plot of ground; but they did carry on the works, though not for some time, the interdict being dated the 6th of March, and nothing being done till the subsequent month of May; but they did carry on those works, and they did thereby, in my opinion, and in the unanimous opinion of the Court below, carry on those works upon the forbidden ground, in breach of that interdict, and while it remained unrecalled.

The question therefore is—1st, what circumstances there were to justify them in carrying on those works, in breach of the interdict? and, 2ndly, if there was no ground of justifica-

tion, what was there to extenuate or excuse the breach? If there was a justification, the interdict was not broken; if there was no justification, it may be that the breach may have been excused or extenuated; and that raises the second question—whether, if anything ought to have been done for that breach at all by the Court, that which has been done was right?

Now, my Lords, the first of these questions is answered by what I have stated in prefacing my opinion, namely, the purport of the interdict. If the interdict merely means that you shall not do certain things on the property of Mr. Hamilton, and if that property is divested, and passes out of him, after the date of the interdict, and before the alleged breach, then, in whomsoever it vests, at any rate the interdict is not broken, because it only forbade the doing something upon the property of Mr. Hamilton; and nothing has been done upon the property of Mr. Hamilton; but something has been done upon the ground after it became that of the Appellants, the other party. But if, on the other hand, the interdict, as I think I have shown, and as the Court below appear to me correctly to have thought, is not to forbid something being done on the property of Mr. Hamilton, but something being done on that which happened at that time to be the property of Mr. Hamilton in possession of his tenant David Murray, namely, a plot of ground in the town and parish of Crawford; it follows, as a necessary consequence, that the interdict has been broken, although the property may in the interim between the alleged breach and the date of the interdict, have changed hands, and become divested from Mr. Hamilton and vested in the other party.

Therefore, my Lords, it is my opinion that the judgment of the Court below must stand, as regards the having visited in some way or other upon the party the consequences of their disobedience of the Court's order, in having presumed, notwithstanding the interdict, to act upon a purchase which they

thought they had made, and the possession which they thought they were entitled to, under the 84th section of this Act.

My Lords, the only question that remains is, whether that which has been done by the Court to punish the breach of the interdict is that which the Court ought to have done, or not?

Now I am very clearly of opinion that the Court has miscarried in the course which it has here taken. I think it appears that there is a practice, and that by the law in Scotland there is a right, in the Court, to inflict a penalty by way of punishment, as for a contempt, by a breach of the orders of the Court, and that this is not merely with the view of compelling justice to be done according to the orders of the Court to a party in the prosecution of his civil right; but it goes a step further, showing that in Scotland the practice, and consequently the law of the Court, is, that the Court may validly inflict a certain penalty with the view of punishment, and to make an example which may deter others, for the future, from disobeying the order of the Court: and although no case has ever been brought to this House for decision as to the right of the Court below so to proceed, yet it must not by any means be supposed that the foundations of the right are shaken, merely because it has never been recognized by the higher authority of this Appellate Court. But the question is, whether in the manner of exercising that right which they possess, in the distribution of that *quasi* penal justice which they have a right and a duty to administer, they have miscarried or no? Then comes the material question as to the circumstances under which that alleged breach, and as I consider proved—indeed admitted—breach of the interdict, for the Appellants admit that they did the thing prohibited, although they say in justification first, and afterwards in extenuation of the breach, that they did it after the property had passed from Mr. Hamilton to Mr. McInnes.

Now, my Lords, as to the circumstances under which that

alleged breach took place, I think it is perfectly clear, and cannot be denied that this party had acquired a right under the 84th section of the Act which had given them a right of entry, and I rather am inclined to think that they damnified their own right by acceding to the recommendation of the Court to present a petition. If I had been the party concerned, I should have paused before I presented that petition; I should have thought that in presenting it, I will not say I admitted myself out of Court, but that I admitted a little more than it was quite safe for me to admit. However, they presented that petition, and that petition sent them necessarily to enquiry, because the Court, upon its suggestion being complied with by the presentation of the petition, remitted it to the Lord Ordinary to proceed. That part of the interlocutor is not complained of—it is no subject-matter of the present appeal, which is confined to the breach of the interdict, and the fine with the expenses. Therefore the parties cannot now be heard to say that the Court was wrong in sending it to the Lord Ordinary. But it is said that the Lord Ordinary is by their appeal prevented from proceeding with the case. Still we are left in this position, which greatly strengthens my view that there has been a miscarriage, namely, that it is not yet finally decided by the competent authority, the Lord Ordinary, to whom this matter has been remitted on the prayer of the Appellants themselves; at the suggestion, I admit, of the Court, yet complied with, and perhaps not very providently complied with on their part. They cannot say that this is completed, because upon their application there has been a remit to the Lord Ordinary to try whether there has been a certain thing done, namely, the purchase, which justifies him in recalling the interdict. That is the very thing, as I understand it, referred to him. But I am so clearly of opinion upon the first argument which I have urged upon the attention of your Lordships, that upon this reason alone there was a breach of the interdict, inasmuch as the inter-

dict applied to the parcel by description, and not so as to be directed to the question of property, that I do not think it necessary to dwell any longer upon this part of the case. Then, what have the Court done? They have inflicted a real fine—a heavy fine—a fine of 300*l.*, and though inflicted upon a rich company, that is no reason why an extravagant fine should be inflicted; and if ever I saw a fine which ought to be called excessive, it is this fine of 300*l.* inflicted for an almost nominal offence. Doubtless it is an offence—it is the breach of an interdict—the interdict stands. They ought to have applied to the Court to have it recalled instead of breaking it by acting as if there had been no interdict in existence; the interdict was subsisting, and a breach of it was committed, and therefore, instead of acting legally, by applying to have the interdict recalled and having it recalled, there is on their part a certain offence committed, a certain degree of contempt incurred by a disobedienee to the order of the Court, but a slighter contempt, under the circumstances, I can hardly conceive—it is so small, that in an action for the wrong done, it is what would have been called in this country a case for a shilling damages.

I am, therefore, clearly of opinion that there has been a miscarriage in the Court below, and that in another respect there has been a miscarriage. For, as regards some parties, there ought to have been no fine at all—not even a shilling fine. I have read, with some degree of surprise, certain of the grounds stated by the learned Judges in the Court below. The Lord Justice Clerk says, "As there is no difference of "opinion among us, it will not be necessary for us to take "more time to consider how this case ought to be disposed "of." "The interlocutor of the Lord Ordinary seems not to "have been applicable to the state of matters which is averred "with regard to it. But I lay aside that, and I take the "case that nothing had been done by the Railway Company "till after the proceedings before the Sheriff. Still, however,

" the Company go on, with the interdict unrecalled, to do the " very things with regard to the piece of ground which they " were directly forbidden to do, assuming that the proceed- " ings under the Lands and Railways Clauses Acts, afforded " a very good ground for a recall of the interdict." His Lordship then goes on to show that, and states, " the distinction " between the Bill Chamber and the Court of Session," and says, "The only course for a party in these circumstances was to " have applied to have the interdict recalled. If the case was not " out of the Bill Chamber, he might have applied again to the " Lord Ordinary on the Bills. If out of the Bill Chamber, " he might have presented a petition to the Court, asking " them to take it up, and recall the interdict. But even if " there had been inconvenience to the Railway Company, it " was caused by the restraint of law imposed upon them in " consequence of their own mistake. This is what a party " must make up his mind to submit to. And no amount of " inconvenience can be a sufficient reason to entitle him to " presume to act at his own hand," (a Scotch mode of expressing what we call in this country to take the law into his own hands) " irrespective of the restraints which the law " has imposed." And so it is in the case I put during the argument of assault and battery upon gross abuse, which would not justify the wrong, but which is sufficient in some measure to excuse it. Then what would be said by the Judge who pronounced the sentence in a criminal or directed the Jury in a criminal case? The party taking the law into his own hands, whatever offence was given to him by the party assaulted, was wrong, but the amount of the punishment or damages must be determined, in part at least, by the provocation given. " Had it not been (his Lordship continues) that we think " there was a notion entertained by the Respondents, perhaps " on fair grounds, that the basis of the interdict had been " evacuated by their proceedings before the Sheriff, we would

" have looked upon this as a wilful breach of the interdict, " and would have punished it by imprisonment." But it is a wilful breach of the interdict, otherwise there should be no proceedings against the parties at all. Parties are not proceeded against for involuntary but only for wilful acts. The learned Judge says it was not wilful. He says, we have looked into the circumstances—we do not say there was a wilful breach of the interdict. But an involuntary act is really an innocent act as regards punishment, and inflicting a fine of 300*l.* for such an act was clearly wrong. But, although it was a serious case, we have no reason to think that it was wilful. " It is always difficult to discriminate motives, and we " have no wish to suppose that the Railway Company had an " intention of directly setting at naught the authority of the " Court." Then they ought not to have been punished at all, if they did not intend to set the authority of the Court at naught. " At the same time it is essential that the gentlemen " in the direction of this concern should be made to feel that " their responsibility to the law of their country is always " direct, and that there are circumstances in which it may be " personal. The judgment of the Court, therefore, is that a " fine of 300*l.* be inflicted." And then it desires the Company to apply to the Lord Ordinary, and the Lord Ordinary is to recal the interdict if he should think fit. Now what is added to this is manifest proof—it is demonstration—that the learned Judge who pronounced this considered, and his learned brother who agreed with him, considered it quite an application of course, to have the interdict recalled, since the property had changed hands, and there was no longer the least ground upon which that interdict could stand. This their Lordships plainly considered, else they would not at the same time that they inflicted the punishment, have desired the party to go before the Lord Ordinary to get the interdict recalled. Therefore the Court, having inflicted this punishment in cir-

cumstances, and upon a ground which they were aware the interdict could not have been proceeded upon, if only that ground had existed at the time it was granted, and at the time the breach was committed (a mere technical ground), must have felt that the merely technical contempt which had been committed, was to be visited in the lightest possible way—as with censure, and, if with any, with the smallest possible fine. As for it being serious, and not wilful, I can hardly follow this distinction. Certainly the Court were perfectly right in considering a breach of any order as wrong, and as punishable by their course of proceeding. But the amount of the offence was as trifling as possible, and the amount of the punishment should have been in the same proportion trifling.

Then upon whom were they to inflict the fine? upon the Caledonian Railway Company. Now I entirely agree that whatever is inflicted, must be inflicted upon the Caledonian Railway Company. But James Hope Johnstone, of Annandale, and a vast number of gentlemen, the Directors, ending with one of Her Majesty's present Ministers, are condemned in the fine, as well as David Rankine, the Treasurer. I shall therefore move your Lordships, that this judgment be altered; that is, affirmed, *quoad* the main point; and that will carry costs, not of the appeal, but in the Court below; and altered as regards the fine of 300*l.*, reducing it to a fine of 40*s.*,—and relieving from even the fine of 40*s.*, those different persons whose names are given here. If so, then it will stand quite clear that this is no ground for denying that in another case the Court may justly inflict a fine of 300*l.*, or even heavier punishment, if they think a wilful contempt has been committed. Our decision only will show that if there has been no wilful contempt,—if there is so remarkable a circumstance as exists in this case to extenuate the offence and make it merely technical, a nominal fine is enough; the offence being that a technically wrong course was pursued,—the course of acting before application was made by

a motion of course to the Court, the Court's right to inflict the same, or even a greater fine or other punishment, is not denied, had these specialities not existed. The discretion in exercising that right in the present circumstances, is alone disputed, and our judgment will only go to limit the discretion with which that unquestioned power shall be exercised.

Lord Brougham.—In this case, as there has been a material variation made in the interlocutor, though the costs below will follow the judgment below,—that is, will go to the representatives of the Respondent, the deceased Mr. Hamilton, yet the costs of this appeal will not be given.

Mr. McNeill.—I do not quite understand your Lordship; if I am under misapprehension I shall be set right. In this order your Lordship proposes to make the Caledonian Railway Company pay merely the costs below. I am going to submit this to your Lordship, with the permission of my learned friends. Your Lordship sees that I have been entirely successful on every point which I have had occasion to contend here. I am brought here as the Respondent upon a petition. I have not said a word to your Lordships as to the amount of the fine, as to which I have no interest.

Lord Brougham.—That is very true; still you cannot have your costs here; that is discretionary at all times.

It is Ordered and Adjudged, That so much of the said interlocutor of the 20th of July, 1847, complained of in the said appeal, as fines and amerciates the Appellants, John James Hope Johnstone, Robert Johnstone Douglas, John Anderson, Alexander Hastie, John Houldsworth, William Lockhart, William Macdonald, John Masterman, junior, Charles Murray Barstow, David Dickson, James Seton Wightman, Henry Menteith, younger, J. Hodgson Hinde, Humphrey Ewing Crum, the Right Honourable Fox Maule, and David Rankine, in a fine of 300*l.* to the Queen, and authorizes and empowers the proper Officer in Exchequer to levy and recover the said fine from the said Appellants, be, and the same is hereby reversed: And it is further

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Ordered and Adjudged, that so much of the said interlocutor as fines and amerciates the Appellants, the Caledonian Railway Company, in a fine of 300*l.* to the Queen, and authorizes and empowers the proper officer in Exchequer to levy and recover the said fine from the said Appellants, the Caledonian Railway Company, be, and the same is hereby varied, to the effect of substituting the sum of 40*s.* instead of the said sum of 300*l.*: And it is further Ordered and Adjudged, That the said interlocutor be in all other respects, and the same is hereby Affirmed: And it is also further Ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this variation and judgment.

GRAHAME, WEEMS, and GRAHAME.

[HEARD *27th March*—JUDGMENT *3rd August*, 1850.]

JAMES LUMSDEN, Esq., of Auchry, *Appellant.*

RICHARD W. DUFF, Esq., of Orton, and OTHERS, Trustees of the deceased JAMES, EARL OF FIFE, *Respondents.*

Jurisdiction.—It is too late, after a party has concurred in the trial of issues, under an order from a Division of the Court of Session, before which the cause in which the issues were raised did not properly depend, for him to complain of the want of jurisdiction to make the order.

Ibid.—Appeal.—The House of Lords has no jurisdiction to entertain an appeal of an interlocutor refusing a motion for a new trial, upon the ground that the cause in which the order for trial had been made did not properly depend before the Division of the Court by which the order had been made, so as to give it jurisdiction over the cause.

Verdict.—Declarator.—Molestation. Damages, &c.—Where in mutual actions of declarator, molestation and damages, brought for the purpose of ascertaining boundaries, an issue setting out a particular boundary is sent for trial, the verdict returned will be good, although it should not implicitly adopt the boundary set out in the issue, but adopt it with a variation, for the case is not one in which the whole matter is left to the jury, but in which the opinion of the jury is only asked to assist the Court in determining upon the conclusions for declarator.

THE facts of this case are so fully set out in the judgment as to make any other statement of them superfluous, further than to observe that the line of march set out in the issue was *in ipsissimis verbis* the march which was set out in the Respondents' summons of declarator, and according to which the summons asked a declarator of their right.

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Mr. Attorney-General and *Mr. Anderson* for the Appellant.

Mr. Bethell and *Mr. Sandford* for the Respondents.

LORD BROUGHAM.—This case, my Lords, of Lumsden *v.* Duff was heard some time ago by my noble and learned friend, who is not now present, and myself. The case arose under these circumstances:—There was a summons of declarator relating to some matters brought by Mr. Lumsden against the trustees of Lord Fife, who are the present Respondents, and who were the Pursuers below. The trustees of the late Earl of Fife had first brought a summons of declarator against Mr. Lumsden, and then Mr. Lumsden brought a summons of declarator relating to the same matter against Lord Fife's trustees. In neither of these cases did what is called the *partibus* endorsed on the summons specify to which division of the Court the cases respectively were to belong. Two notes of advocation *ob contingentiam* were also brought by Lord Fife's trustees, of processes which had been depending between them and Mr. Lumsden before the Sheriff of Aberdeen. The partibuses on both those notes of advocation were marked "Lord Murray, "Second Division." Afterwards, those two notes of advocation and the summonses of declarator appeared in Lord Murray's Outer House Roll as Second Division Cases, and the whole four cases were then conjoined, and proceeded before Lord Murray in the Second Division, before whom the issues were adjusted. There was afterwards an interlocutor pronounced in the Inner House, by which Lord Fife's trustees, the Pursuers in the first declarator, and the Defenders in the second declarator, were directed to stand as Pursuers of the issues, and Mr. Lumsden was directed to stand as the Defender in those issues. That interlocutor being pronounced in the First Division, was pronounced without Mr. Lumsden having taken any objection whatever that it was not the division of the Court to which the case

belonged. Lord Robertson, who, it was afterwards said, had no jurisdiction, except by force of an order of the First Division, by virtue of the power given to him, tried the cause at Aberdeen, and a verdict was found by the jury for the Pursuers, that is, Lord Fife's trustees, the present Respondents, the Pursuers in the first declarator and the Defenders in the second. It was then enrolled before the First Division, and by that division remitted to the Second Division; and a rule was moved for by Mr. Lumsden, (who had never objected before to the irregularity, or touched upon any question of jurisdiction,) to show cause why the verdict should not be set aside, with a view to a new trial being obtained; and he gave as his ground that the marking of the partibuses on the notes, which was insisted upon here, conclusively fixed the conjoined processes in the Second Division, that the enrolments of the cases in the Rolls of the Outer House had been as Second Division cases; that the order as to which party was to stand Pursuer, and as to which party was to stand Defender, had been pronounced in the First Division, and that the case had been sent to Lord Robertson to be tried at Aberdeen, under an order of the First Division, and therefore it was said that as he had no jurisdiction at all but for the order of the First Division, that order could not apply to the case, because it was, *de jure*, a cause in the Second Division. It was also said that no order which might have been pronounced by the Second Division could have empowered Lord Robertson to try the cause, because, although a Second Division cause, it was then *de facto* in the First Division. This was an objection to the want of jurisdiction; and upon this objection the question here arises. There are three interlocutors brought before the House, upon which I am now to move your Lordships to pronounce final judgment.

My Lords, I have received from my noble and learned friend, the late Lord Chancellor, Lord Cottenham, that which I shall now read to your Lordships in his absence, and in which I entirely coincide. He says:—

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"This appeal is against three interlocutors of the Court of "Session. The first, Because the First Division had directed "that the Respondents should be Pursuers in issues directed "by the Second Division. The second, Because the Second "Division, to which the cause properly belonged, had refused "a motion for a new trial. And the third, Because, having so "refused, they had applied the verdict in disposing of the cause "upon the merits.

"The Appellant and Respondents are owners of contiguous "estates, and the principal contest is as to the boundary between "them. Each, in separate suits, asserted title to the portions "of land within the boundary claimed, and each set out the "boundary claimed. The suits were conjoined and the issues "directed; the first issue being as to the boundary claimed by "the Respondents, and the second as to the boundary claimed "by the Appellant; in each case the description of the boun-"dary being taken from the summons by which it was claimed. "The jury found in favour of the boundary claimed by the "Respondents, but with a variation as to part, which the verdict "specified; not, as to this part, establishing the boundary as "claimed by the Appellant, but correcting an error in the "Respondents' description.

"After the issues had been settled by the Lord Ordinary, "as in causes of the Second Division, application was by mis-"take made to the First Division, as to which party was to be "Pursuer upon the trial of the issues, and it was directed that "the Respondent should be Pursuer, for which an interlocutor "was made, which is the first appealed from, upon the ground "that the First Division had no jurisdiction to make any "interlocutor in a cause belonging to the Second Division. "No such objection appears to have been raised when the "application was made, or until after the verdict upon a motion "for a new trial."

That is to say, the party took his chance of a verdict, and

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when he found the verdict against him, discovered an irregularity, and then for the first time stated it, and availed himself of it. Lord Cottenham says: "The Court did not consider "this as any ground for setting aside the verdict, and, in my "opinion, they were right. The error was common to both "parties, and did not, in any respect, affect the merits of the "case." His Lordship means, and I entirely agree with him, that it was an objection which would be very cautiously listened to even in the first instance; it might, in the first instance, be well or ill founded, but when not taken advantage of until after the verdict, and until after the party has taken the chance of a jury trial in order to obtain a verdict in his favour, and when, finding the verdict against him, he for the first time repents of having done that which amounted to a waiver, and endeavours to avail himself of the objection, it cannot be listened to. His Lordship proceeds: "If no such interlocutor had been pro-"nounced, the Respondents would have been the proper Pur-"suers; and after the trial had taken place, and the rights of "the parties had been ascertained, the Court would have greatly "miscarried if it had set aside all the subsequent proceedings, "because such an order had been made by the First Division, "whereas it ought to have been made by the Second. If this "interlocutor were now to be set aside upon appeal, the rights "of the parties would not be affected if the other interlocutors "stood; and if it be used here, as it was below, as a ground "only for a new trial, it will be seen that this House is by the "Acts precluded from interfering with it," having no jurisdiction, as we have frequently had occasion to observe, to review a refusal to grant a motion for a new trial.

His Lordship goes on to say, "The second interlocutor "appealed from is that by which the Second Division refused a "motion for a new trial. I think they were right in so refusing "upon the merits. But what provision has the law made upon "that subject? The 6th section of the 55th George III, "chapter 42, which regulates applications for new trials, declares

" that such interlocutor granting or refusing a new trial, shall " not be subject to review by reclaiming petition, or by appeal " to the House of Lords; and section 8 provides, that upon " such application being refused, the verdict shall be final and " conclusive as to the fact or facts found by the jury, and shall " be so taken and considered by the Court in pronouncing their " judgment, and shall not be liable to be questioned anywhere.

" The third interlocutor appealed from is that by which the " Court applied the finding of the jury, and upon the facts " thereby found, decided upon the rights of the parties. The " objection made to this interlocutor was, that the jury had " exceeded their powers in finding any variation in the boundary " claimed by the Respondents, and that, as they had not proved " the boundary as laid, the verdict ought to have been for the " Defender. This was one of the grounds upon which a new " trial was applied for; and if the refusal of such application " cannot be reviewed upon appeal, and the verdict must there- " fore stand, what would be the effect of discharging that inter- " locutor upon this appeal?—That the suits would wholly fail, " and the rights of the parties remain as unsettled as before they " were commenced. By virtue of the enactments, the verdict " must stand, and standing, it could not be applied or used in " deciding upon the rights of the parties. The 8th section " appears to me to be conclusive upon this point, by making " the finding of the jury conclusive upon the Court in pro- " nouncing its judgment. If there had been any real objection " to the finding of the jury, it would have been a ground for a " new trial. Of such objection the Court of Session are made " the sole judges; and they having decided against the objec- " tion, it cannot be raised upon appeal. In fact, there is no " ground for the objection. This is not a case in which the " whole matter is left to the jury, but issues are directed to " ascertain facts necessary to enable the Court to dispose of the " matters brought into discussion by the summonses. The dis-

" pute as to the boundary necessarily raised questions as to the " title to those lands affected by the boundary, and each sum- " mons not only insisted upon the boundary as claimed, but " asked for a declaration of title to such lands as each party " claimed as included within his alleged boundary. Upon such " summonses it was competent for the Court to adjudicate in " favour of the title to some of such lands, and against it as to " others. The verdict ascertaining the boundary fixed the title " to the lands, and the interlocutor gives effect to such title, " which it was competent to do.

" As to the claim to the water, the verdict is conclusive. If " there had been any doubt as to the propriety of the finding " upon the evidence, it could only be taken advantage of by " a motion for a new trial. That experiment was made, and " failed, and cannot be brought on again upon appeal.

" I am of opinion that upon all these points the Court of " Session were right, and that all the interlocutors must be " affirmed with costs."

His Lordship therefore considers that the verdict was right; his Lordship considers that the judgment was right, and he rejects the appeal upon the different grounds stated; and entirely agreeing with his Lordship, I am prepared to move your Lordships that the interlocutors appealed from be affirmed, and the appeal be dismissed with costs.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellant do pay, or cause to be paid, to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby

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remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON—LAW, HOLMES, ANTON, and TURNBULL.

[HEARD 1*st July*—JUDGMENT 5*th August* 1850.]

THE GLOBE INSURANCE COMPANY OF LONDON, and MANDATORY, *Appellants.*

THOMAS MCKENZIE, of Applecross, W.S., *Respondent.*

Diligence.—Arrestment.—Competition.—Arrestment, used by a creditor on the dependance of an action against the executors confirmed of his debtor, which was brought after the lapse of six months from the death of the debtor, for the purpose of attaching a debt given up in the inventory of the deceased's estate, will give the arresting creditor a preference over the other creditors, who have only cited the executors.

Trust.—Will.—A will, being in form for the settlement of the testator's estate on the assumption of solvency, does not become a trust for creditors by the emerging fact of insolvency, and the circumstance that the first purpose of the trust is payment of debts.

Personal Objection.—Waiver.—Preference.—Circumstances in the conduct of a creditor held not to bar him from taking steps to secure a preference over the creditors of his debtor, or to a waiver of his preference after he had secured it.

JAMES SCOTT, accountant in Edinburgh, died on the 6th day of March, 1830, leaving a trust disposition and settlement, whereby "for the better settlement and disposal of my affairs in "the event of my decease," he conveyed to Mary Scott, his spouse; Andrew Rutherford, advocate; Roger Aytoun; Thomas McKenzie (the Respondent); and Alexander Dallas, William A. Turner, and Ralph E. Scott, as trustees, his whole real and personal estate, "And to afford the greater facility in the "execution of this trust," he appointed the trustees to be his sole executors.

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The purposes of the trust were, First the payment of the truster's debts.—Second, mournings for his widow and family and a specified payment to the widow, until the term at which she would be entitled to the first half-yearly payment of the interest of the funds afterwards provided to her.—Third, for delivery of his household furniture &c., to his widow as her absolute property, should she continue such, and an arrangement for payment of the value by her and her second husband, should she again marry.—Fourth, for payment to his widow of the interest of the free residue of his estate, for the benefit of her and his children. —Fifth, for restriction of payment of the interest to 200*l.* per annum, in case his widow should again marry.—Sixth, for payment upon the death or marriage of his widow, of his estate among his children in specified proportions.—Seventh, for payment of the interest of his estate in case his widow should remain unmarried, and all their children have died without issue, between her and his father, and of the capital among his brothers and sisters.

Rutherford and the Respondent did not accept the trust given by this deed, but the other trustees and executors did accept, and in the month of January, 1831, confirmed the will, and gave up an inventory of the estate, in which they included as part of it a balance, due to the defunct as trustee for D. Forbes of Culloden, amounting to 7,831*l.* 2*s.* 9*d.*, with periodical interest from March, 1830. This debt was the subject of the competition to be afterwards noticed. The trustees appointed Turner, one of their number, to act as factor in the management of the estate.

Soon afterwards, it appeared to be very problematical how the trust estate would turn out, owing to the circumstance that Scott had in the year 1825 bound himself to pay the Appellants interest at the rate of 4 per cent. upon a loan of 125,000*l.*, to Tait, of Harvieston, and that, as judicial factor on the estate of Cromarty, he was indebted to that estate in upwards of 10,000*l.*, for which the Respondent was his cautioner.

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Shortly after accepting the trusts of Scott's Will, Turner drew up a sketch of the estate, from which it was made to appear that, without taking into account the large liability on account of Tait's debt, the immediate liabilities of the estate would be 18,305*l.* 4*s.* 4*d.*, while the assets immediately available would be 17,112*l.* 0*s.* 5*d.*, leaving a balance against the estate of 1,693*l.* 3*s.* 11*d.* This sketch showed another view, by which it appeared that there would still be other debts to be provided for, amounting to 4,221*l.* 0*s.* 6*d.*, while there would remain other assets in the hands of the trustees, amounting to 26,283*l.* 7*s.* 8*d.*, leaving a balance between these two amounts in favour of the estate, of 22,062*l.* 7*s.* 1*d.* Both of these views were framed on the supposition that Forbes, of Culloden, on whose estate Scott had been trustee, would be able to carry through an arrangement for paying off his debts, and among the rest that which he owed to Scott. The sketch showed a *second* view of the estate, on the supposition that Culloden would not be able to carry through his arrangement. According to this, a reversion of 20,369*l.* 3*s.* 2*d.* was brought out. A *third* view gave a more favourable prospect, in the anticipation of a speedy release from the liability in respect of the loan on Harvieston, and payment of Culloden's debt, by an early and favourable sale of both of these estates. On the 27th March, 1830, Turner submitted this sketch to a meeting of Scott's trustees, which was attended only by Aytoun and R. Scott. At this meeting it was stated that the sketch had been communicated to the Respondent McKenzie, who had declined accepting the trust, in the meanwhile.

On the 5th of July the trustees resolved to pay off the small creditors under Robertson of Lude's trust, to which Scott had been a debtor at his death, the payment being confined to sums under 50*l.*, unless an obligation were given by the creditors whose debts exceeded that amount, to pay back, in case there should ultimately be a deficiency in Scott's trust estate to pay all its liabilities.

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On the 10th August, 1830, the trustees altered their resolution to take an obligation for repayment from Robertson's creditors, being of opinion, "that while, on the one hand, they "are entitled to take this obligation from the creditors, under "the circumstances in which these dividends were to be paid, "before almost any of the other burdens upon the trust-funds "were discharged, yet they, on the other hand, conceived, that "as there was every appearance of the funds being more than "sufficient to meet all possible demands upon them; and also "that, by the payment, unconditionally, of these creditors, it "might give confidence in the trust-management, and thereby "prevent others from urging their claims until the funds had "been realized."

On the 1st of September, 1830, Turner communicated to the trustees that interest upon the Harvieston debt, amounting to 2,400*l.*, had been demanded; that he had in his hands 1,800*l.* of the Harvieston rents wherewith to pay it, and that Harvieston had been put up for sale, but no part of it had been purchased, and as the rents were insufficient to pay the interest, the deficiency, if the lands should not be sold, would have to be made up out of Scott's estate. The trustees authorized Turner to pay the present deficiency out of Scott's estate, but expressed their expectation that a sale of Harvieston, when re-exposed, would render a repetition of this unnecessary.

At a meeting of the trustees held on the 31st January, 1831, a general account of the trust affairs was given; from this it appeared that a second payment of interest on the Harvieston debt was called for, and would have to be made out of the trust estate, and that the estate was in embarrassment for want of funds to settle this and other demands.

At a meeting of the trustees held on 3rd March, 1831, it was communicated to them that the Appellants had agreed to take Turner, the factor's, bills for 2,000*l.* of the interest due on

the Harvieston debt, upon the bills being guaranteed by the trustees. This arrangement was acceded to by the trustees, and the required guarantee was given.

At a meeting held on the 29th of March, 1831, Turner submitted to the trustees a correspondence between him and the Bank of Scotland, who were urgent for payment of a debt owing to them by Scott, and expressed an expectation that, as they understood the trustees were making payments out of Scott's estate, the trustees would pay to the bank a sum corresponding to the payments made to the other creditors. The minute of the trustees bore that "with regard to the obser- "vations by the Bank of the trustees having made payments to "other creditors of Mr. Scott, in preference to them, the very "contrary is the fact; and that while they have only made such "payments as were indispensably necessary for the proper "management of the trust, excepting in the case of Robertson "of Lude's creditors, which the trustees authorized their factor "to pay, from the peculiar circumstances of the case, as "explained in former minutes, the obligations of the Bank "have, on the other hand, been all settled or arranged, "excepting in the case of the Harvieston trust, and the "balance of the 700*l.* in Elibank's affairs. The trustees like- "wise approve of the explanations given by Mr. Turner, and "authorize him to continue to afford every information to the "Bank which they may require. At the same time they are "of opinion that the Bank should be satisfied with the expla- "nations which they have already received."

At a meeting held on the 5th August, 1831, Turner explained that the bills for the interest on the Appellants' debt, due at the preceding 6th March, had not yet been provided for, but would probably be met by returns from the lands of Harvieston, but that another half-year's interest was falling due, for which there were no funds in hand. Upon this subject the minutes of the meeting were thus expressed:—"With

" regard to the interest now falling due, the trustees, while they " are deeply sensible of the vital importance which it is of, in the " arrangement of Mr. Scott's affairs, that no alarm should be " allowed to arise, find it impossible, in the present situation of " matters, to make any immediate payment; they, however, " anxiously hope that the Globe Insurance Company will " equally consider it for their interest to avoid bringing matters " to such a crisis as the proceeding against Mr. Scott's estate " would lead to, and that they will readily allow of some delay. " With this view, the trustees request Mr. Aytoun and Mr. " Turner to see Mr. Gibson-Craig on the subject, and if " necessary after doing so, request Mr. Turner to call another " meeting of the trustees."

This subject of the interest on the Appellants' debt and the difficulties in the way of meeting its payment, were resumed by the trustees at a meeting on the 22nd August, 1831, and again at a meeting held by them on the 6th of December, 1831, when the following minute was made.

" With regard to the demand by Sir James Gibson-Craig, " on the part of the Globe Insurance Company, that no security " will be given to the Bank of Scotland, or otherways, that can " tend to create any preference on Mr. Scott's funds, to the " prejudice of the Company, the trustees can have no objection " to declare as they now do, that they will give no security to " the Bank of Scotland, or otherways, that can tend to create " any undue preference over Mr. Scott's funds; and if any such " preference is attempted to be obtained, they will give notice " thereof to the agents for the Globe Insurance Company."

On the 30th January, 1832, the Respondent wrote Mr. Turner in these terms.

" Mr. Scott's trustees cannot accuse me of acting prema- " turely, if I now call, as I do, for a state of the trust transac- " tions and management, from their commencement to the " present time. The large balance due under the Cromarty

"judicial factory gives me much and unceasing uneasiness, and "the aspect of Mr. Scott's affairs will regulate my future "conduct in that matter."

Mr. Turner wrote him in answer, that he would bring his letter before the trustees so soon as he returned to Edinburgh, whence he would be absent for eight or ten days.

On the 6th of March, 1832, the trustees prepared a vidimus of the estate, which showed that the funds would be 33,964*l.* 10*s.* 8*d.*, and that the liabilities would be 17,018*l.* 6*s.* 10*d.*, leaving a surplus of 16,946*l.* 3*s.* 10*d.*, without taking into account the liability for the interest on the Appellants' debt.

In the month of March, 1832, the Appellants raised an action of constitution against Scott's trustees, founded on Scott's obligation to pay the interest of their debt on Harvieston, and on the dependance of the action used inhibition. On the 10th of April the trustees held a meeting, at which they expressed a desire that Turner should communicate to the Respondent the vidimus prepared on 6th March preceding.

In the month of May 1832, the Respondent, hearing of the step which had been taken by the Appellants, brought an action against Scott's trustees for relief of his obligation as cautioner for Scott's intromissions as factor on the Cromarty estate.

At a meeting of the trustees held on the 1st of May, 1832, Turner stated to them that hostile proceedings had been commenced by the Appellants, with the view of interfering with his management of the Harvieston trust, and that the Bank of Scotland had also been urgent upon the subject of the debt owing to them, and that both of these parties required an obligation from the trustees that they would not make any payment out of Scott's estate to their injury. The minutes of the trustees upon the two subjects contained the following entries.

"The trustees are of opinion, that the Globe Company "should, in the meantime, remain satisfied with the pledge

" which they have already received, that no payments will be " made by them which can in any way tend to interfere with " or injure any claim that they may have upon Mr. Scott's " funds; and they hereby renew their pledge to that effect " accordingly.

" The trustees, while they believe that the Bank are satisfied " of the particular hardship of the case, have no hesitation in " pledging themselves, and they hereby do so accordingly, not " to give or allow any preference, so far as they can prevent it, " from being obtained over Mr. Scott's funds, at the instance " of any individual creditor, and not to pay away any part of " the funds but by equal division among his whole creditors."

The minutes also bore the following paragraph in regard to the Respondent's claim upon Scott's estate.

" The trustees thereafter, upon a full consideration of the " whole affairs, consider it right that a communication should " be had with Mr. Thomas McKenzie, who has such an interest " in the result, as cautioner for the Cromarty balance; and they " remitted to Mr. Aytoun to call upon that gentleman, and to " explain to him generally the present state of matters, and, " should he wish it, to fix a meeting with the trustees, in order " that every information may be afforded to him, which the " trustees consider he is well entitled to receive, from the for- " bearance which he has shown in not before now pressing for " relief from his obligation."

These entries were communicated to the Respondent and Appellants respectively.

On the 8th of May the Respondent wrote Turner in these terms:

" I told you at our last interview, that, in consequence of " my previous conversation with Mr. Aytoun, and of the steps " taken by the agents for the Globe Insurance Company against " the representatives and property of the late Mr. Scott, I felt " it to be my duty to consider what course I should follow for

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"ultimate security as regards my imprudent cautionary engage-
"ment for Mr. Scott. I accordingly explained the state of
"matters, in so far as known to myself, to a legal friend of
"eminence, and, by his advice, I have raised an action of relief
"against Mr. Scott's trustees and representatives, and directed
"arrestments to be used in your hands as trustees, &c., but for
"the present nowhere else. My clerks and the messenger are
"strictly enjoined not to speak of these proceedings, nor will I
"execute the summons sooner than is absolutely necessary; but
"to remain quiescent while others are almost in Court, would
"injure me and my family, without benefiting Mr. Scott's heirs."

On the same day the Respondent used arrestments in the hands of Turner, who was factor for the trustees, on the estate of Forbes of Culloden, of whatever sums might be owing from it to Scott.

On the 5th of June, 1832, Scott's trustees "after anxiously "considering the aspect of the whole affairs under their manage-
"ment, the proceedings which have been already adopted against
"them, and are further threatened at the instance of other
"creditors," resolved to call a meeting of Scott's creditors, and to hold it after the first step, which would soon be taken, in the Appellants' action against them.

At a meeting of Scott's trustees held on the 5th of October, 1832, Turner stated to them that decree for an interim sum had been given against the trust in the proceedings of the Cromarty trust, and that the Respondent had raised an action of relief against the Trustees in respect of his cautionary obligation for this debt, but "the summons had not been called last session,
"as Mr. Turner had understood from Mr. McKenzie that his
"object was merely to keep himself on a footing of equality
"with Mr. Scott's other creditors, and that he would not
"proceed with his action until the winter session, and that the
"trustees might have the advantage of the vacation to realise
"the trust-funds."

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The minute, after noticing other subjects of difficulty connected with the estate, concluded thus:

"*Lastly*, With regard to calling a meeting of Mr. Scott's "creditors for the purpose of taking their directions as to the "future management, the trustees consider this to be now a "step, not of choice, but almost of necessity; and though those "having claims against Mr. Scott are aware generally of the "impediments and embarrassments to which the affairs have "been subjected, from their entanglement with Mr. Tait's "affairs, still the trustees view it not only as proper towards the "creditors, but as necessary for their own exoneration, to call "them together, so as they may be made exactly aware of the "present state of matters, and give such directions as they may "think proper for the extrication of the affairs and the realizing "of the trust-estate. As, however, it would be very difficult to "have a full meeting at present, the trustees delay fixing any "day, but they feel anxious that it should take place before the "meeting of the Court in November."

On the 10th of December, 1832, a meeting of the creditors was called for the 13th of December, and the meeting was held on that day. This meeting was attended by the solicitor for the Appellants, and by "Henry Simpson, Esq., for Mr. "Mackenzie, W.S." *i. e.*, the Respondent. Mr. Turner produced to the meeting a report of the trustees upon the state of Scott's affairs, with a separate vidimus of the funds as at Martinmas, 1832. The meeting, having considered these, deferred coming to any resolution on the subjects brought under their notice, but appointed a committee, of which the Respondent was to be a member, to examine and report generally upon the trust matters.

In the report submitted to this meeting a detail was given of the actions against the trustees by the Appellants and the Respondent, which concluded thus:

"These are the whole of the actions which have been raised

" by the creditors; and the object which the trustees have now " in view, is to put matters upon such a footing as to prevent " any undue preference being obtained by one creditor over " another."

The vidimus, also submitted to the meeting, brought out an estimated surplus of funds after providing for the liabilities of the estate, with the exception of the debt due to the Appellants.

These documents were read to the meeting, and were afterwards communicated to the Appellants and the Respondent, among others, in the course of the months of December, 1832, and January, 1833.

On the 31st of January, 1833, the Respondent returned the papers, and added: " as illness will prevent my attending the " meeting of a committee of creditors convened for Friday next, " it is perhaps better, for this and other reasons, that I should " at once decline, as I now do, being a member of that com- " mittee. I am, &c."

In the month of January, 1842, Renton, as trustee on the estates of Culloden, raised a summons of multiplepoinding of a sum of 12,301*l.* 13*s.*, which he admitted to have been owing from the estate to Scott. To this action he called as Defenders, the Appellants, the Bank of Scotland, and the Respondent, for himself and as factor on the Cromarty estate.

The Appellants appeared as claimants in this action in respect of the collateral bond given by Scott, for payment of arrears of interest upon their loan of 125,000*l.* to Tait, of Harvieston, which amounted at the 6th of March, 1839, to the sum of 40,506*l.* 19*s.* 6*d.* For this sum the Appellants claimed to be ranked *pari passu* with the other creditors of Scott.

The Respondent also appeared as a claimant in respect of his obligation as cautioner for Scott, in his office of judicial factor on Ross of Cromarty's estates, and of a decree of relief which he had obtained in the action which he had brought against

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Scott's trustees. In satisfaction of his relief the Respondent claimed to be preferred *primo loco* on the fund *in medio*, in virtue of his arrestments.

The trustees of Scott also appeared, and claimed to be preferred *primo loco* on the fund *in medio*, as made over to them for payment of Scott's debts in the first place.

After the record had been closed upon condescendences and answers, the Lord Ordinary (Cuninghame) ordered cases to be boxed to the Court, and on the 31st May, 1848, the Court pronounced the following interlocutor:

"Find, that the arrestment at Thomas McKenzie's instance, "dated 8th May, 1832, is valid and effectual, and sustain his claim "of preference in virtue thereof for the debt contained in the action "on the dependance of which the said arrestment was used, as "the same shall be ultimately ascertained, and in the meantime "rank and prefer him on the fund *in medio*, for the sum of "8,662*l.* 2*s.* 8*d.*, with the legal interest thereof from the 15th "day of May, 1833, contained in the *interim* decree, dated 17th "July, 1847, but deducting from the said interest the sum of "533*l.* 6*s.* 2*d.*, being the dividend received from Mr. Scott's "trustees on the 2nd day of August, 1839, and decern: Find "the trustees of the said James Scott, appearing as claimants "in this action, and the trustees of the Globe Insurance Com-"pany of London, and Sir James Gibson-Craig, Bart., their "factor and commissioner, also claimants, liable in expenses to "the said Thomas McKenzie."

The appeal was taken against this interlocutor.

Mr. Solicitor-General, *Mr. R. Palmer*, and *Mr. Goldsmid* for the Appellants.—1. Arrestment is not a competent mode of acquiring a preference over the creditors of a deceased person where it is used to attach funds already confirmed by his executors, but outstanding in the hands of third parties to the effect of establishing any preference for the arrester. An heir

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is *eadem persona cum defuncto* and liable universally for his debts, unless, under the Act 1695, he limit his liability by an inventory. But an executor is a mere representative of the defunct; no further liable than for the estate taken possession of by him. So soon as he does take possession he is, in the language of the case Bell *v.* Campbell, *Kaimes*, 893, "trustee "for all concerned, and cannot withdraw the fund." See also *Bell's Com.*, 286: *Dirleton's Do.*, 31: Ellis *v.* Hall, *Dirl.* 148. The executor's title, when completed, carries the property out of the defunct and vests it in the executor upon the trusts of his office. If the executor has not confirmed, the creditor may himself confirm in his character of executor-creditor, and then, the fund being vested in him, he may pay himself as an ordinary executor, and as to the surplus remaining in his hands after doing so, he is like an ordinary executor-trustee for those entitled. Such a confirmation as executor-creditor would give a preference over an arrestment used in the life of the defunct, because after his death and before confirmation, the title is not in any one, but by the confirmation, the right is taken up by the party using it, because confirmation operates as a transfer of the property. Carmichael, *Mor.* 2,741: Wilson *v.* Fleming, 2 *S. & D.*, 230. Accordingly in Rutherford, *Mor.* 774, it was found that arrestment used after the debtor's death was not a habile mode of diligence, and did not give any preference over creditors expeding confirmation, who as to their own debts have effected an absolute transfer of the property concerned.

The property being transferred to the executor by confirmation, he holds it for payment of his own debt in the first place, if he have any, and afterwards for the other creditors of the defunct, but arrestment in his hands is not competent. *Stair.* iii. 8, 67. Citation and decree are the only means by which payment by the executor can be enforced, for arrestment would prevent the diligence by the executor spoken of by *Stair.* Originally the duty of the executor was to pay *primis venientibus*,

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but to prevent injurious preferences, the Act of Sederunt, 28th February, 1662, declared that creditors using diligence within six months of the debtor's death by citation of the executor, or obtaining themselves confirmed executors-creditors, or citation of other executors-creditors, should come in *pari passu* with creditors who might have used more timely diligence by obtaining confirmation or otherways. Confirmation, or citation of those who may have confirmed, was the only remedy of a creditor after this Act was passed, for if arrestment had still been competent, the object of the Act of Sederunt would have been entirely defeated, that object being to remedy the prejudice sustained by creditors obtaining themselves to be decerned "executors-cre-"ditors to the defunct, to the prejudice of other creditors, who, "either dwelling at a far distance, or being out of the country, "or otherways not knowing of the death of their debtors, are "postponed, and others using sudden diligence are preferred." And there is no instance in the books of any attempt to establish a preference within the six months by means of arrestment.

The object of the Act of Sederunt then was to accomplish equal distribution within the period of six months after the debtor's death, but the decisions extended the equalization beyond the six months, for in Gray *v.* Callender, *Robertson's App. Ca.* 483, it was decided that even after the six months, priority of citation and of decree did not give any preference, and in Russell *v.* Symes, *Bells Oct. Ca.* 217,—a creditor who had not cited the executor until *after* the six months, was ranked *pari passu* with another who had cited him *within* the six months, and likewise obtained the first decree, the fund being still in the hands of the executor.—That case shows that a citation within the six months will not give a preference over one used beyond the six months, so long as the fund is *in medio*, and by necessary consequence, an arrestment beyond the six months cannot give a preference over a citation and decree beyond the six months, and thus the Respondent's arrestment

in the present case, cannot give him a preference, as it was posterior to the citation of the Appellants. This view is further confirmed by McDougall *v.* Stevenson, 13 *S. & D.* 55, where it was found that creditors, using arrestment of funds of their debtor, deposited in a bank by his heir served *cum beneficio inventarii*, and executor confirmed *qua* nearest of kin, (the arrestment being with the knowledge that there was a deficiency of funds,) had not gained any preference over the other creditors. There the executor had confirmed, *suo jure*, while here he did so under a trust-deed, showing the present to be a still stronger case.

No doubt in Atkinson, Mure, &c., *v.* Bogle and Learmouth, *Mor. Service and Confir. App.*, No. 3, arrestment of a sum of 100*l.*, which had been confirmed, was sustained; but that sum formed a mere fraction of the amount in dispute, and was not the subject of any discussion, or of any reference to the previous authorities. The only other case which gives any apparent support to the Respondent's contention, is Swayne *v.* Fife Bank, but the question there decided was that arrestment against executors "was not an inhabile diligence," and neither it is, to the effect of securing the fund arrested, as was shown in Bell *v.* Campbell, *Mor.* 3,861, where the object of the arrestment was to prevent the executrix assigning away the fund in payment of *her own* debt. But it is altogether another question whether the arrestment is good to give a preference over other creditors, that question was not decided in Swayne *v.* Fife Bank. In Henderson's Trustees *v.* Drummond, 9 *S. & D.* 618, the successful creditor held a bond from the trustees of the defunct, who had thereby made themselves directly liable to him; and in Dunlop *v.* Weir, 2 *S. & D.* 150, the only question decided was whether arrestment in the hands of *the factor* of the executrix was competent. The arrestment there was diligence in the hands of the executor, and was sustained as such without the question of preference having arisen at all.

But whatever other observation these cases may be open to,

this must be observed of all, that in none of them was arrestment sustained where there had been a prior citation of the executor. If this be so, then the law, as it existed prior to 1790, still remains.

II. But, moreover, arrestment was out of the question, inasmuch as the trust-deed by Scott, being for creditors, had carried the fund out of his estate, and vested it for behoof of the creditors as a body, so as to be no longer liable to attachment by any single creditor. Whatever doubt there may have been originally as to the character of the trustees, this is certain, that before the Respondent had used his arrestment, it had become notorious that the estate would not be solvent, and that there would not be any reversionary benefit for the family. The trustees, therefore, by the trust-deed and subsequent confirmation, vesting the estate in them, had a good and perfect title before the diligence of the creditors began.

III. The Respondent, at all events, was barred, by personal exception, from taking steps to establish a preference in his own person. He attended meetings of the trustees, and received information from them, on the assumption that nothing was to be done by him to gain a preference. Their minute, communicated to him, expressed this in so many words, and no dissent was uttered by him. The effect of this conduct was to mislead the trustees and the creditors into the belief that he assented to this representation of his intentions, and to induce them to refrain from taking those steps which would have protected their interests. He was participant in measures based on the assumption that he would not secure a preference for himself; and by his silence he not only misled the trustees, but induced the creditors also, to believe that the assumption was correct, and to sleep upon their rights. The law will not allow a party thus to take advantage of his own duplicity. In Evans *v.* Bicknell, 6 *Ves.*, 183, Lord Eldon said, "It is a very old head of equity that if "a representation is made to another person going to deal in a "matter of interest, upon the faith of that representation, the

"former shall make that representation good if he knows it to "be false." The Respondent, by standing by, was as much a party to the statement, made to the creditors, as if he had made it by his own mouth; that his proceedings were intended "merely to keep him on a footing with Mr. Scott's other "creditors;" and Henderson *v.* Cheyney, 2 *Vern.*, 150; Raw *v.* Pope, 2 *Vern.*, 239; and Hobbs *v.* Norton, 1 *Vern.*, 136, show instances of cases in which a party inducing others, or allowing them to act upon a false belief, was compelled to make good the belief; and E. India Coy. *v.* Vincent, 2 *Atk.*, 83; Berrisford *v.* Milward, 2 *Atk.*, 49; Nevill *v.* Wilkinson, 1 *Bro. Ch. Ca.*, 46; Dalbiac *v.* Dalbiac, 16 *Ves.*, 116, show that if a man, having a latent right, stands by and allows money to be laid out or anything to be done whereby other parties may be prejudiced he will not be allowed to set up his right. The cases in English law upon this subject are numerous, but the same principle was recognized by the Judges in McDougall *v.* Stevenson, 13 *Sh.*, 55, before alluded to.

Sir F. Kelly and *Mr. Bethell* for the Respondent. I. The deed by Scott was not one for creditors generally, which excluded separate diligence by individual creditors. The deed was *mortis causâ*, and not more or less than a will, the provision for payment of debts in the first place being mere superfluity, or *quod inest in jure*. There was nothing, then, in the nature of the deed, to prevent the course taken by the Respondent. No doubt, where there is a trust for creditors, each has a *jus quæsitum* in the estate, which no creditor can, by his separate diligence, defeat. But here the trustees were mere *hæredes in mobilibus* of Scott—his representatives in respect of it, and nothing more, and the deed in their favour was "not to "tie up the hands of creditors," Thomson *v.* Butler, *Mor.* 1224.

Such being the position of the trustees, arrestment against

them in the hands of debtors to the estate was a competent mode of diligence. *Bank*, III. 1, 50, lays it down expressly that debts due to a defunct must either be confirmed or attached by arrestment in the hands of the executor confirmed. In Atkinson *v.* Mure & Bogle, *Mor. Serv. & Con. App.*, No. 3, it was found, so long back as the year 1808, that arrestment used against an executrix of a debt which had not been confirmed by her was an inept proceeding, because it had been used "before the executrix had, by confirmation, vested "any proper right in herself to the fund in question," but in regard to a particular debt which had been confirmed, the arrestment was sustained. The principle of that case was, that, until confirmation had been expede by some one, executor or creditor, there was no title to the fund in any one. If the creditor of the defunct himself expede confirmation, then he has made himself the creditor of the defunct's debtor, in addition to his previous character of creditor of the defunct, and may proceed to make the claim effectual, as in the ordinary case of debtor and creditor. So on the other hand, if the executor expede the confirmation, he thereby gains a title as in the case of the creditor, he makes himself the creditor of the defunct's debtor—but he has not done more—he has not gained possession as well as right—he also must proceed against the debtor in the ordinary way, and then, the relation of debtor and creditor being established between the executor of the defunct and his debtor, the creditor of the defunct may step in by arrestment and prevent the executor having the benefit of his proceeding to recover payment.

This is well shown in the case of Henderson's Trustees *v.* Drummond, 9 *Sh.* 618, where the competition was between arrestments used *before* and arrestments used *after* confirmation, and the latter were preferred.

No doubt the Act of Sederunt 1662 precludes the creditor taking this course within six months of the defunct's death, to

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the effect of establishing for himself any preference over creditors who have, "within that period," used the diligence spoken of by the Act; but, as said by *Ersk.* III. 9, 45, "questions of competition among those who have used no "diligence till afterwards, must be determined by the legal "rules of preference, as if the Act of Sederunt had "never been made." Here the proceedings, both of the Respondent and of the Appellants, were long subsequent to the six months.

Accordingly, in Dunlop *v.* Weir, 2 *S.*, 150, where arrestments had been used by one creditor within the six months, in the hands of a factor to an executrix confirmed, and by another after the lapse of the six months, so well was the law of preference of the two diligences considered to be fixed, that no question was raised by the posterior arrester upon that point; the contest was confined to showing that arrestment in the hands of a factor was no better than if used in the hands of the executor himself. So, in McDougall *v.* Stevenson, Lord Glenlee said, "In Dunlop *v.* Weir, the only point raised "was, whether the arrestments competing were competent in "the hands of a factor; but how came that to be the only thing, "unless on the assumption that if the arrestment were formal "and valid in itself, it would have given a preference."

The current of authorities therefore shows that arrestments after lapse of the six months, and after confirmation expede, are not to be set aside for the benefit of creditors at large. Were it otherwise, if persons using diligence after the six months were to be in no better situation than if they were within the six months, it would be difficult to say what could have been the use of the Act 1662. No doubt in McDougall *v.* Stevenson, 13 *Sh.*, 55, arrestments used after the six months were not given effect to; but that was upon a ground no way affecting their efficacy as a mode of diligence, or of acquiring a preference; the objection given effect to was, that the party had barred him-

self from the benefit of his individual diligence by acquiescence in a course of management for behoof of the creditors at large.

II. The objection that the Respondent is barred from the benefit of his arrestment, must be founded entirely upon his own acts. If the Respondent had at the outset known that the estate was insolvent, such knowledge would not have barred him from the use of diligence for his own protection; but the evidence negatives any such knowledge, and shows that he did not interfere in the trust in any way, and had no knowledge of the insolvency until he used the arrestments, but that he was, on the contrary, led to believe by the statements of the trustees, that there would eventually be a surplus. If the facts would support the Appellants' argument, the Respondent would not dispute the principle they contend for, but inasmuch as the facts do not do so, the cases from the law of England on which they rely, have no application to the present; for there is no pretence for saying that the Respondent lulled the creditors into any idea of security, while he was secretly gaining a preference over them. So far from this, the Appellants were themselves taking such measures as they thought prudent for their own security.

[*Lord Brougham.*—The Appellants rely on this, that though the Respondent declined to be trustee, he was all along cognizant of the state of the trust.]

There is no evidence of such knowledge, or of the Respondent having seen anything to belie the hopes held out by the trustees of an ultimate surplus.

LORD BROUGHAM.—My Lords, this case has been argued as one of considerable importance in itself, which it unquestionably is, and as bearing upon an important branch of the law of Scotland. It has been argued with the ability which is usually observed in the arguments of the learned Counsel who attend at

your Lordships' bar. I certainly have a strong inclination of opinion in favour of the judgment which has been pronounced below with perfect unanimity by the learned Judges of the Inner House. There is an absence of hesitation on the part of those learned Judges, as if they entertained no doubt whatever about it, either with respect to the law or with respect to the fact, disputes upon both the one and the other of those heads being involved in the argument at the bar. One of the most able of those learned Judges, Lord Fullerton, expressed, indeed, great surprise at hearing a matter mooted for the first time, as he seems to think; at all events, mooted for the first time to his knowledge, which appeared so perfectly clear as to be, he conceives, beyond the reach of confutation. Nevertheless, I shall take time to look into the authorities, and into the facts of the case; for this reason, that we not unfrequently have to consider most elaborate and most able opinions, supported by admirable reasoning, in which the learned Judges are led away to deal more with the law than with the facts. Accordingly, I find in this case that the very able opinion of Lord Fullerton, which has been eulogized at the bar, and in that panegyric I entirely concur, nevertheless deals much more with the disputed points of law than with the equally disputed matters of fact. It is, therefore, necessary, in order that no mistake may be committed, remediless in this Court of last resort, that our attention should be directed closely to the facts as well as the law, upon which facts possibly the decision may ultimately turn. For this reason I crave permission of your Lordships to delay moving the judgment in this case until to-morrow; and if I should still find that I wish further time for consideration, I shall postpone it until Saturday morning, whether we sit here in causes or not on that day. At all events we may come here for this cause, if it should not be finally disposed of to-morrow.

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LORD BROUGHAM.—My Lords, In this case I craved your leave to have a short delay, in order that I might examine, if it was possible that so much attention had been given to a very important point of law, as prevented sufficient consideration being had of the disputed matters of fact; for this case, involving no doubt an important question of law, presents also some particulars of fact which behove to be disposed of before we can apply the law, and safely decide the case.

I find, my Lords, that the original impression which I had during the greater part, if not the whole of the argument, is entirely confirmed by a more full consideration of the whole case; and I am prepared now, to submit the result of that consideration to your Lordships, and to move that the judgment which has been pronounced in the Court below, be affirmed.

Three questions are raised on this appeal.—First, Had the Respondent any right in law by his arrestment of a debt due to Mr. Scott deceased, and on suing his executor confirmed, to obtain as the fruits of the arrestment, a preference over other creditors, the estate being insolvent, or assumed to be insolvent? Secondly, Had the deed, the trust disposition and settlement of Mr. Scott of the 17th of September, 1827, the force and effect of a trust disposition for distribution among his creditors, so as to cut down any arrestment, or to prevent any preference, to which, but for this, the Respondent might be entitled? Thirdly, Has the Respondent, by his conduct in Mr. Scott's affairs, and towards the other creditors, excluded himself from the benefit of his diligence of arrestment, supposing that both the former questions are decided in his favour—that is to say, supposing him to be neither excluded by the general law of distribution, nor by the deed of 17th September, 1827? These three questions exhaust the case entirely.

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First, a person dies, and we will assume his estate to be insolvent, either at present or in prospect; for this insolvency is the ground of the question being material. His will is confirmed in the usual way, by a proceeding answering to our probate. One of his creditors brings his action against his executor, who has been confirmed, or, as we should say, has proved the will and accepted the executorship. Also he (the creditor) arrests a debt due to the estate in the hands of the debtor. The question is, can this party, the creditor of the deceased testator and of his executor, thus obtain a preference? The importance of this question in any country, especially any commercial country, is manifest, and it would be difficult to conceive the possibility of such a question still remaining undecided. But we are accustomed in this Court of Appeal, to have such cases brought before us, as show that the fact of a point having been clearly and long since decided by the Courts of Scotland, is no reason for it not being again disputed, and again appealed, when again decided.

The feeling under which this observation is made by me, appears to have forcibly presented itself to the learned Judges below. For though Lord Jeffrey seems to have wavered in his opinion on this important and well settled position, the doubt which he states appears to have arisen from what he terms "a "natural leaning to the equal principle of rateable distribution "of the Insolvent Estate." A leaning which, however natural it may be, would exclude the undoubted Scotch rule of an executor paying *primo venienti* before the Act of Sederunt, and in cases of administration not falling within that Act—a leaning which however natural, would entirely exclude the undoubted right given to executors by the law of England, of electing what debts of the same degree they shall prefer—to which I must really add, that, (as Lord Fullerton justly observes), there can no more be discovered a reason for requiring an equal division among creditors after a debtor's death, than for requiring the

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same equal division during his lifetime—which prior to his declared insolvency or bankruptcy cannot be effected without his consent. But all these doubts of Lord Jeffrey become immaterial to my view of this matter, when I find that after closely examining the question, and especially it must be supposed the authority of decided cases, his Lordship expresses an entire and unhesitating concurrence in opinion with all his learned brethren—an avowal of somewhat altered view, to be expected from the known candour of that most excellent and most distinguished person.

Come we then to Lord Fullerton, who prefaces his able and luminous judgment with this remark, "The negative of the "proposition," (that is, the negative of the first proposition I have propounded) "has been maintained with very great ability, "and a degree of earnestness which I must fairly say surprised "me, as I conceived the point to be settled, not only on "principle, but by repeated judgments of the Court." It forms but little excuse for the raising of questions upon points already oftentimes disposed of, that the zeal of the disputants is accompanied with ability, or with great ability, or even with very great ability. Such vain contentions are to be lamented as a mere waste of such ability, and they are still more to be reprobated as a waste of valuable time to the Courts of the country where the useless display is made, and to this Court of review in the last resort.

Upon the first point, then, I agree with the Court below, entirely and without any hesitation; and this both upon principle and upon authority. First, upon principle. An executor is not a trustee for either creditors or legatees, though he is bound to satisfy the claims of both, just as a testator is bound to satisfy the claims of his creditors during his lifetime. He is in the shoes of the testator deceased, and his capacity being representative, and not fiduciary, is the ground of all the duties imposed on him, and all the equities against him. It is a man's

duty to pay his debts during his lifetime. He does a wrong if he spends the money wherewith he should satisfy all, in paying one, and leaving the others unpaid,—no question of that. Comes his decease; comes his executor in his shoes to represent him after his decease; and the executor has that very duty which the testator in his lifetime had, and which every honest man ought to perform,—the duty of paying his creditors equally. But he is not bound to pay them equally prior to his bankruptcy, or the distribution of his estate under the bankrupt law, or under the insolvent law; he may give a preference to any he pleases. So may the executor, past all doubt, so he does not prefer debts of a lower to those of a higher kind, a distinction, however, which is unknown in the law of Scotland.

Next upon authority—where decided cases leave no doubt, it is superfluous to cite text-writers. Here there is no doubt on the decisions. Swayne's case, Atkinson and Boyle, Dunlop *v.* Weir, Cricken's creditors *v.* Macdouall, it is sufficient to name. But the very point was decided apparently in Thomson *v.* Butler, and in the case of Sibbald's trustees. Those cases throw material light upon the second question, with which I am not now dealing. Great stress has, in different stages of this case been laid on the Appellant's behalf, upon the case of McDougall *v.* Stevenson. On that case two observations arise. First, as remarked by the learned Lord President, in his very able judgment, Lord Mackenzie's opinion did not receive the concurrence of the Second Division, before which the cause came; and besides, it proceeded mainly upon a special ground, namely, the conduct of the party, which comes under our third head, and cannot affect the general question upon which I am now arguing. Secondly, Lord Mackenzie himself had that case of McDougall *v.* Stevenson brought to his notice fully, in disposing of the present question, and it did not affect his full concurrence with the rest of the Court, in their judgment upon that question. He stated the special grounds of difference, and

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gave his clear opinion for the proposition maintained by the Respondent, and sanctioned by their Lordships. It is quite hopeless to rely on a decision thus repudiated by the judge himself who pronounced it; repudiated, at least, as wholly inapplicable to the case at bar; and such a contention is futile as well as hopeless.

As to the bearing of the Act of Sederunt, 1662, I really cannot see, any more than the learned judges below, how it enters into this discussion; for its operation is confined to six months, beyond which time here both the confirmation and arrestment took place.

2. But secondly, though the law is clear in the general case, the party may be excluded by a trust. An executor may be also trustee for the distribution; he may be under the obligation of other duties than those of a representative; or he may have a double duty cast on him, and may thus be precluded from giving up the fund *primo venienti*, or, as here, he may be precluded from yielding to the diligence of the arrester, and protected from that diligence. Is there such a trust in this case? I am very clearly of opinion that there is not. A trust for a family purpose, or a testamentary purpose, or both, does not become a trust for the payment of creditors, merely because the deed constituting it contains a direction to pay the maker's debts. This direction is frequently and superfluously added to such instruments; frequently, it may be, only to show on the maker's part, an intention of obeying the law; superfluously, because that law would impose the duty, whether the deed laid it on or not. Here the purpose of the deed is set forth. It is a *mortis causâ* deed, to regulate and settle Scott's affairs. Testamentary arrangements are its substance; and it contains a clause of revocation. It can give no kind of right to any one creditor, beyond what he would have had were there no such clause respecting creditors in the deed. The Court, in Cricken's creditors *v.* Macdouall, held it clear that a clause imposing on

the executor the payment of the testator's debts, imported no more than *quod inerat de jure*. Then the rule of law applies, *expressio eorum quæ tacite insunt neque nocet neque prodest.* The case of Sibbald's trustees, already referred to, is another decision clearly to the same purpose; and it arose upon a competition of arrestments.

3. On the third question I need not long dwell. I entirely agree with Lord Fullerton and Lord Jeffrey in their remarks upon this portion of the case. After stating how far, at the date of the arrestment, anything had been done which could have barred Mr. McKenzie from resorting to diligence in order to obtain a preference, Lord Fullerton says: "It would require "some very strong evidence indeed to prove that he had aban- "doned, by a subsequent waiver, that right of preference which "on this view he had already obtained. Mere acquiescence in "the proceedings of the trustees would most certainly not be "sufficient. The supposed accession of Mr. McKenzie to the "trust, as a proper trust for creditors, is at best but an accession "by implication." Lord Jeffrey says: "Then as to the extra- "vagant proposition that Mr. McKenzie, having acquired a "preference, afterwards renounced it, I must say that that would "require a very express renunciation. But instead of this, and "in order to prevent such an inference, he takes a protest "against it being supposed that he had done so."

My Lords, I have hitherto treated this case as if it were a manifestly unanimous judgment of the Court below. It may be said that the opinion of Lord Cuninghame, the learned and very able Lord Ordinary, forms an exception. This I take leave to doubt, if not to deny. When his Lordship, instead of giving his interlocutor with his reasons, takes the case to report to the Court, he must mean by this course of proceeding to imply that he has not made up his mind upon the case. If he had, he ought to have given the decision, and then let the party against whom he decided take it to the Court; but he

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takes it to the Court himself, because he has not fully made up his mind. I do not deny that he shows a leaning, and makes, as he always does, an able and luminous note upon it, the first sentence of which, however, suffices to show us that really—and I speak it with great deference to that learned Judge—he begins by begging the question, or at least he begs so large a portion of the question as is quitè sufficient to decide the case: "The record and revised cases prepared by the parties, show "that the present is a competition between *trustees*, who are "confirmed executors *under a general disposition* and settlement "of a defunct debtor, *for behoof of his creditors at large*, and an "individual creditor." If you grant that, you go very far to granting the whole matter in dispute. I deny it. I havé stated the reasons why, agreeing with the Court below, I do, and have a right to deny that it is such a deed; and therefore it is not such a competition as his Lordship states, between the trustees for the payment of the debts at large, and any one creditor.

My Lords, expressing my surprise, in common with the learned Judges below, that the case should have been so contentiously argued against the authorities (because as to saying that Lord Stair has a doubt upon the matter, cases have been decided again and again, long since, which leave no doubt) I have no hesitation in advising your Lordships to affirm the interlocutors appealed from, with costs.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellants do pay or cause to be paid to the said Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month

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from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

J. C and H. FRESHFIELD—SPOTTISWOODE and ROBERTSON.

[HEARD 3rd—JUDGMENT 5th *August*, 1850.]

THE GLASGOW, BARRHEAD, AND NEILSTON RAILWAY COMPANY, *Appellants.*

THE NITSHILL COAL COMPANY and OTHERS, *Respondents.*

Arbitration.—Lands Clauses Consolidation Act.—A reference to arbitration in terms of a statute must be conducted according to the provisions of that statute.

Ibid.—Ibid.—Statute.—Waiver.—A reference under the Lands Clauses Consolidation Act being once entered into, the parties cannot waive adherence to the provisions of the statute in the conduct of the proceedings.

Arbitration.—Power.—A power in parties to a submission to renew it, will not, when exercised, renew an appointment of an overs-man by the arbiters, which had fallen on expiry of the reference.

THE Appellants, in the course of constructing their railway, entered on possession of part of the lands of Househill, after having satisfied the proprietor and agricultural tenant in regard to the value of the land so taken.

Some time afterwards, the Respondents set up a claim to minerals lying under this land, and a correspondence took place in September, 1846, under which it was agreed to have this adjusted by a reference. Accordingly, a deed of submission was entered into between the parties, which recited: "And whereas "the parties hereto, not agreeing whether any compensation is "due by the first party to the said second party, or as to the com- "pensation claimed by the said second party from the said "first party; the said parties have agreed to have the said "questions determined by arbitration, in terms of the Lands

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"Clauses Consolidation (Scotland) Act, 1845, and the Railway "Clauses Consolidation (Scotland) Act, 1845:" and appointed Murray and Drummond as arbiters "in terms of the said Acts" to decide the matters in dispute; "and in case of their differing "in opinion, and in so far as they shall so differ, of an overs- "man to be chosen by them, in terms of the said Lands Clauses "Consolidation (Scotland) Act, all claims of compensation and "damages whatsoever, competent to the said second party against "the said first party, under the said Glasgow, Barrhead, and "Neilston Direct Railway Act, 1845, and the said Lands Clauses "Consolidation (Scotland) Act, 1845, and the said Railway "Clauses Consolidation Scotland) Act, 1845, in consequence "of the said first parties' operations under the foresaid Acts, or "any of them; and with power to the one arbiter to act and decide "without the other, and for the oversman to act and decide, all "in the events and manner provided for in the said Lands "Clauses Act in general, with full power to the arbiters, or single "arbiter, or the oversman, to do everything necessary and pro- "per for bringing the matters submitted, to a just and speedy "issue, in terms of the said several Acts, and whatever orders "or decrees, interim or final, the said arbiters, or arbiter, or "oversman, shall give forth and pronounce, in terms of the said "Acts, the parties hereto bind and oblige themselves, and their ".respective successors and representatives, to fulfil, perform, "and observe." This deed bore date the 16th and 23rd days of October, 1846.

On the 25th and 26th of November, a minute setting out in these words, "We the parties to the within submission," was endorsed on the Deed of submission, and subscribed by "John Tennent, Secretary" to the Appellants, Company, and by the Respondents, prorogating the submission indefinitely.

Upon the 26th November another minute was endorsed on the Deed of Submission, and signed by the arbiters, whereby they, for the first time, accepted the reference, and appointed

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McCreath to be oversman "in terms of and with the powers "specified in the Acts of Parliament within mentioned, and "we also extend the time within which our award may be "pronounced to a period of six months from the date hereof."

A claim for the Respondents was lodged with the arbiters on the 19th December, 1846. Answers to this claim were lodged by the Appellants on the 9th of March, 1847. On the same day, the arbiters ordered replies by the Respondents. The replies were lodged on the 26th of March, and on the 2nd of April the arbiters allowed the parties a proof of their averments.

No further proceeding took place within the period to which the arbiters had enlarged the time for making their award. This expired on 26th of April.

On the 12th of July, 1847, a minute was endorsed on the submission by John Tennent, "on behalf of and as authorized "by" the Appellants' Company, and by the Respondents, renewing the submission "for the farther period of three "months."

On the same day witnesses were examined by the parties, and the same procedure took place on the 19th and 26th of July, and the 13th and 24th of September.

On the 12th of October a minute of prorogation for three months was endorsed on the submission, and was signed by the Appellants' secretary on their behalf. On the 21st of October and 4th November further evidence was led.

On the 27th of December another minute was endorsed on the submission, prorogating it "for two months after the 12th "of January next," and was also signed by the Appellants' secretary. On the 11th of January, 1848, the arbiters signed a minute devolving the submission "in terms thereof upon "William McCreath, the oversman already appointed by us."

The oversman issued notes of his judgment to the parties, and upon the 11th of March, 1848, executed a formal decree-

arbitral, bearing that it was made under the Deed of Submission between the parties, and decreeing the Appellants to pay to the Respondents the sum of 1,451*l.* 8*s.* 2*d.* as compensation for the minerals under the land which they had taken.

"XIV. By the 26th section of the Lands Clauses Consoli-
" dation (Scotland) Act, 1845, it is enacted, that the arbiters
" appointed in terms of the Act, 'shall, before they enter upon
" ' the matters referred to them, nominate and appoint, by
" ' writing under their hands, an oversman to decide on any such
" ' matters on which they shall differ, or which shall be referred
" ' to him under the provisions of this or the special Act.'

"XV. By section 30 of the said Act, it is enacted, 'If,
" ' when more than one arbiter shall have been appointed, and
" ' neither of them shall refuse or neglect to act as aforesaid,
" ' such arbiters shall fail to make their award within twenty-
" ' one days after the day on which the last of such arbiters
" ' shall have been appointed, or within such extended time as
" ' shall have been appointed for that purpose by both such
" ' arbiters under this Act, the matters referred to them shall be
" ' determined by the umpire to be appointed as aforesaid.'

"XVI. By section 35 of the said Act, it is enacted, 'If the
" ' party claiming compensation shall not, as hereinbefore pro-
" ' vided, signify his desire to have the question of such com-
" ' pensation settled by arbitration, or if, when the matter shall
" ' have been referred to arbitration, the arbiters or their
" ' umpire *shall for* THREE *months have failed to make their or*
" ' *his award, the question of such compensation* SHALL BE
" ' SETTLED *by the verdict of a jury*, as hereinbefore provided.'"

The Appellants presented a note of suspension of a charge under the decree-arbitral upon these preliminary grounds, besides objections to the merits.

"1. The submission had fallen before the award complained
" of was pronounced; much more than three months having
" expired from the date of the reference to arbitration.

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"2. It was incompetent either for the arbiters or parties to "prorogate the submission, the statute being imperative that, if "no award should be issued for three months after the date of "the reference to arbitration, the question of compensation "shall be settled by the verdict of a jury. Moreover, the "Complainers did not prorogate or authorize any prorogation of "the submission."

The Respondents pleaded, in answer to the preliminary objections, that

"1. The submission had not fallen before the oversman "pronounced his award, but was regularly renewed and pro- "rogated, and was in full force when the decree-arbitral was "pronounced.

"2. More particularly, the minute signed by the arbiters, "extending the time within which they were to issue their "award, was not *ultra vires*, but within the express provisions of "the Lands Clauses Consolidation Act; besides, the Complainers "not having objected to the minute at the time, supposing it "competent for them to have done so, but, on the contrary, "having recognized and sanctioned the same by obtempering "the order pronounced by the arbiters, and thereafter pro- "ceeding to answer the claim lodged by the Respondents, and "to lead proof, and to attend to all the other steps in the sub- "mission, and having themselves repeatedly prorogated the "submission on subsequent dates, were barred from pleading "such an objection, supposing it otherwise well founded.

"3. The Complainers' secretary was entitled, by the Acts of "Parliament founded on, to subscribe the submission; and "having done so, he was equally entitled to sign any renewal "or prorogation of the submission which might become neces- "sary in the course of the procedure thereon.

"4. At all events, the minutes having been signed by the "secretary of the Company, as representing the Complainers in "the submission, and acted on by all the parties thereto, the

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" Complainers were bound by his acts, and were not entitled to " bring forward these very acts as grounds on which to have " the decreet-arbitral, and whole procedure in the submission, " set aside."

The Lord Ordinary, on the 25th August, 1848, refused the note of suspension, and on the 22nd of December, 1848, the Court adhered to his interlocutor.

The appeal was against these two interlocutors.

Sir F. Kelly and *Mr. Anderson* for the Appellants. I. As under the original submission the arbiters did not, in terms of the statute, appoint an oversman before entering upon the matters referred to them, subsequent proceedings under it would have been void, even had they been regular in other respects, but as likewise there was no decision given by the arbiters or oversman within three months after their appointments respectively, the reference fell to the ground, and the matter could only competently be settled by a jury; all proceedings after the lapse of the three months are a nullity.

II. The reference having fallen, there was no power under the statute to renew it. On the contrary, the inference from the provisions of the statute is, that there should not be any such power, the policy being to compel a speedy decision. But even if there had been a power to renew, that power had never been exercised. By the 24th section of the Lands Clauses Consolidation Act an appointment of an arbiter is to be " under " the hand of the secretary, or any two of the Directors." Tennent, the secretary, therefore, had power to sign the original submission, but that once done, he was *functus*, and a renewal of the submission once fallen could only be affected by a fresh resolution of the general body of Directors, again agreeing to refer, for *quoad hoc*, the secretary was a mere instrument to bind the Company to what the governing body should previously have resolved upon.

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III. But assuming that the submission was renewed by the minute of prorogation of 25th and 26th November, the subsequent proceedings are nevertheless void. The first act of the arbiters was to extend the time within which their award might be pronounced "to a period of six months." This apparently was done in exercise of the power given by the 30th section of the statute; but that power was controlled by the 35th section, which limited the period to three months. Three months were allowed, however, again to elapse without any award; nay, there was none even within the six months; so the renewed submission, supposing it to be effectual, likewise fell.

IV. The reference by the original deed, and by the minute of 25th and 26th November, having thus both fallen, the minute of prorogation of 12th of July may be said to have again revived the reference, and the subsequent minutes of 12th October and 27th December may be said to have still further kept it alive. But the proceedings under these minutes were void, inasmuch as the arbiters had not repeated the appointment of an oversman "before entering upon" the matters referred to them. The renewed reference under the minute of 25th and 26th November having fallen, the appointment of oversman had fallen with it, and required to be repeated at the outset of the proceedings under the subsequent minutes.

Mr. Solicitor-General and *Mr. Wortley* for the Respondents. I. The correspondence in September 1846 showed a voluntary agreement to refer, without regard to the statute, and the very claim which was the subject of that correspondence is expressly mentioned in the deed of submission. The provisions of the statute were imported into the deed by voluntary agreement. It was equally competent for the parties by agreement to have dispensed at the outset with these provisions, or to drop them afterwards. The latter was the course adopted by the minute of 25th and 26th November, with mutual consent; the reference

therefore ceased to be under the terms of the statute, and compliance with its provisions was no longer necessary; and all the proceedings are to be viewed without reference to them, but upon the ordinary rules applicable to references generally. In Fleming *v.* Wilson, 5 *S. & D.* 841, the omission to appoint an oversman until after the lapse of year and day, was held to have been cured by the parties having appeared and pleaded before the oversman, and similar objections were overruled in Hicks 8 *Taunt*, 694—Lawrence *v.* Hodson, 1 *Yo. & Jer.* 16, so here any defect in the reference was cured by the proceedings taken by the party.

[*Lord Brougham.*—The submission says that it is "in terms" of the statute. The question then is, whether the parties did not bind themselves to follow the Act?]

II. Even if the reference is to be treated as being under the statute, it was decided in Caledonian Railway Company *v.* Lockhart, 12 *D. & Y.* 338, that the provision in the statute as to a decision being made within three months, was in favour of the parties, and might consequently be renounced by them. The secretary, by signing the minute of prorogation, bound the Company. He was the officer whom the statute designated for the duty. It did not lie upon the Respondents to see that he had express authority for what he did. If he had power to enter into the submission, they were entitled to assume that he had power to prorogate it. The Company may have recourse against the secretary for excess of authority, but as between them and the world, his acts must stand; were this otherwise, it would be impracticable to deal with large bodies, such as these Companies. But, moreover, the secretary was also the law-agent of the Appellants, and conducted the proceedings under the reference. There can be no dispute that the Appellants are bound to recognize his acts in that character. By appearing then on their behalf before the arbiter, he adopted the prorogation for them, and bound them to confirm all that took place under it.

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III. It was not necessary for the arbiters to repeat the nomination of an oversman. The oversman was clothed by the nomination on the 25th November, and as the arbiters did not accept the reference until the 26th of November, there was substantially no reference until that date. The appointment by the arbiters on the 26th November, therefore, was strictly within the terms of the statute, and it did not require to be renewed, for when the reference was revived by the minutes of prorogation, the appointment of the oversman was revived along with it.

LORD BROUGHAM.—My Lords, this case assumes a considerable degree of importance from the manner in which the application of the statute respecting the formation of Railways has been dealt with below. I have frequently seen occasion to lament that the learned Judges sometimes do make a short step to get at what they consider substantial justice and the merits of the case, and do not always sufficiently distinguish trifling technicalities from those on which the construction of statutes depends; so that the very things which are thus treated as mere niceties, truly form in such cases the whole merits of the case where the question arises upon statute law. I, therefore, desire anxiously to look into the points made in this appeal, and into the statutory provisions on which it must turn. With this view I shall crave your Lordship's indulgence to allow this case to stand over till Monday next.

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LORD BROUGHAM.—My Lords, from the view which I take of this case, it will not be necessary for me to trouble your Lordships with stating the ultimate question, namely, that regarding the award and the right of the arbitrators to deal with the subject-matter, a point which was ably and fully argued on both sides at the bar. But, after the best consideration which

I have been able to give the case, both during the argument and since, and after considering the Act of Parliament, especially in connection with the course of proceeding taken by the parties themselves, I am clearly of opinion that this judgment cannot stand.

My Lords, we have here another instance of great ingenuity and great subtlety among the learned Judges, as well as among the Counsel, thrown away, from not closely and accurately attending to the statutory provisions which the Court is called upon to administer, and by which it is strictly bound. To say that this case is not under the statute—to say that the parties have a right to repudiate the statute and its remedies, and to go upon a common law arbitration as if there were no statute under which they were acting, appears to be wholly impossible. They are stopped from saying this by their whole proceeding. It is all under the statute, from beginning to end. For example, if it is not under the statute, why all this prorogating of time? Why are they to enter minute after minute, first three months, then six months, to bring themselves within the terms of the Act? That is assumed. Then assuming that it can be cut down to three months, then three months more, and at last two months. It is perfectly clear from this, together with the appointment by the arbitrators of an oversman, which the parties took care should be made, or which the arbitrators took care should be made, that they might have an oversman before they proceeded a step. It is perfectly clear from this, as indeed it is from every piece of the process. But all is statutory. Their whole proceedings make a distinct reference by name to the two Acts of Parliament in question. Then it is statutory from beginning to end. The question is, have they complied with the statute? There is no doubt in the matter. They clearly have not, because the statute requires that the two arbitrators shall appoint an oversman or umpire before they break ground, before they proceed to the business. Well, they appoint

one, being aware that they are bound to do so—they appoint an umpire validly and legally in the first instance, and if within the first period, during the subsistence of his appointment and before the prorogation, the proceedings had taken place and the award had been made, past all doubt it would have been valid —it would have been valid even if the party had not consented and had not proceeded—it would have been valid altogether. But instead of that, they go on, the time expires, and it is prorogated, or rather I should say, there is a hiatus, and it must be renewed, it is making a new submission. The parties have a right to do that. Be it so, we need not dispute that. But there is a duty, not only on the parties, but on the arbitrators, as to the appointment of an oversman or umpire. The parties have no more to do than a stranger with the oversman. It is expressly provided that the arbitrators shall appoint the oversman, and they do not appoint him; but the parties are said to have appointed the oversman because they did—what? Because they prolonged the period of the submission. But my continuing A. B., who has the power to perform an act which I myself have no power to perform, continuing A. B. in possession of that power, does not continue the act which he performed before I renewed his appointment. He did, in execution of the power, something which expired when his own authority expired. Then I continue the authority. Does that revive what he had done before his authority had expired? Past all doubt it does not, supposing I have no power myself to do this act, and *ex concessis* I have no such power. The parties name the arbitrators; the arbitrators name the oversman; the parties who cannot name the oversman never can be held to name him by naming the arbitrators. If the parties had assumed to name the oversman, the Act would have been merely nugatory. But they have not even done so much. They have named the arbitrators, at least they are said to have continued a former nomination. But no act done by them can continue the act

done by others, and which act they had neither power to do nor to continue. They only continue the power, not its execution, or acts done in execution of it. And there are many obvious reasons why it should be the arbitrators, and not the parties who choose the oversman.

Therefore, I have no hesitation in advising your Lordships to reverse the interlocutors appealed from, the effect of which will be to find for the suspension and to pass the bill, and grant the interdict.

It is Ordered and Adjudged, That the said interlocutors complained of in the said appeal, be, and the same are hereby reversed, and that the said cause be remitted back to the Court of Session in Scotland, with directions to that Court to pass the Note of Suspension and grant the Interdict, and to do further in the said cause as shall be just, and consistent with this direction and judgment.

J. H. LANG.

[HEARD *29th July*—JUDGMENT 9th August, 1850.]

DUNCAN CAMPBELL PATERSON, Esq., of Lochgair, Argyleshire, *Appellant.*

MRS. ELIZABETH RUSSELL or PATERSON, Spouse of the said D. C. PATERSON, *Respondent.*

Marriage.—Husband and Wife.—Separation a Mensa et Thoro.—Separation of married persons is not justified by conduct on the part of the husband rendering the wife's life miserable and uncomfortable, but unaccompanied by violence, actual or menaced, to her life, limb, or health, or cruelty and maltreatment, rendering it impossible for her to live with him.

Ibid.—Appeal.—Expenses.—Where a married woman fails in supporting upon appeal a decree of separation *a mensa et thoro*, she cannot have the costs of the appeal; but the reversal of the decree will not be extended to that part of it which gave her the expenses in the Court below.

IN the month of May, 1844, the Respondent brought an action against the Appellant by a summons, in which she set forth that she had been married to him in the month of July 1843: "That notwithstanding of the marriage between the Pur- "suer and Defender, and that by the laws of God and man, he, "the said Defender, was bound to protect and cherish the "Pursuer, yet true it is, that the said Defender shaking off "all regard to his conjugal vows, instead of behaving himself "towards the Pursuer with tenderness and humanity, has con- "ducted himself towards her in a cruel manner, so that her "life has been rendered a burden to her, and might have been "endangered if she had continued to live with him: That his "whole conduct towards the Pursuer has been influenced by a "desire to expel her from his house: That, in particular, he "has never discharged the duties of the marriage-bed, or of a "husband to a wife, and since about six weeks after the date

" of the celebration of the marriage, the Defender ceased to " hold any intercourse with the Pursuer, insomuch, that although " he resided in the same house with her, he did not speak to or " with her, and withdrew himself entirely from her bed, and " never entered her apartment, nor held intercourse with her in " any way whatever; and in his whole conduct in regard to her, " he treated her in the most contemptuous and insolent manner; " and he did so openly in the presence of the domestic servants " and others: That he has not only ceased to associate with the " Pursuer, but he has prevented her acquiring the society and " friendship of his acquaintances and neighbours, and has also " prevented her from making visits to or receiving visits from " them, although he was in the habit of making such visits him- " self, or with his sister: That the only occasion when she has " been permitted to be in his own presence were at and during " the hours of breakfast and dinner, and even then he held no " converse with her, but treated her with utter silence and con- " tempt, and upon the meals being finished, he left the house, or " retired to his own room by himself or with his said sister, and so " secluded himself from the Pursuer till next dinner or breakfast " hour, when the same scene was again gone through; and he " was also in the practice of taking tea and refreshments in his " own room, either alone or with his sister, without permitting " the Pursuer to be present: That the Defender has repeatedly " left the house for three or four weeks at a time, or for other " shorter periods, and gone to Ireland or elsewhere, leaving the " Pursuer at home without a single farthing wherewith to furnish " necessaries required during his absence: That, even when at " home, he never allowed her money for any purpose whatever, " and she has been all along, since her said marriage, entirely " dependent on the bounty of her father, who has been under " the necessity of providing her money for various domestic pur- " poses: That the Defender has openly and frequently, both by " word and in writing, and *inter alia*, in his letters to the Pur- " suer's father, avowed that he has not, and never had, any

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" affection for the Pursuer—that, indeed, he has an utter and " unalterable dislike of her; and has acknowledged not only that " he has given her cause for unhappiness, but also that he is " aware that in his house 'she neither was nor can be happy:' " That the Defender has declared himself separated from her " and that he never will again return to her: That, accord- " ingly, following out that declaration, and for the purpose, " as it would appear, of making the misery of the Pursuer " even more felt, he has not only altogether forsaken her society " in the house, but has made it a practice openly to walk out " or drive with his said sister, to whom he has directed all his " attentions; and this he did while he knew that the Pursuer " was by herself in bitter solitude, and far from any friends or " relations who could, in any way, contribute to her comfort: " That he never once, since said marriage, has been in church " with the Pursuer, nor on any occasion has he agreed to accom- " pany her there, or allowed her any opportunity of enjoying " church ordinances: That he has prohibited all her relations and " friends from visiting her, and, indeed, from entering his house, " and has threatened personal violence against all of them who " should attempt to do so: That the Pursuer, in consequence " of these threats, and his utter want of affection, and harsh, " undutiful, and cruel conduct towards her; of never having " received the treatment of a wife in any one respect, and of " being exposed to the scorn, contempt, or pity of her own " servants, and finding her life altogether made miserable and " endangered, felt compelled to quit the Defender's house, and " did so upon the 6th of April last, 1844 years."

Upon these allegations, the summons concluded for decree of separation *a mensa et thoro*, and for yearly aliment.

The Appellant pleaded in defence, that the action was both groundless and irrelevant. The record having been closed on summons and defences, the Lord Ordinary (Cuninghame), on the 25th June, 1845, " in respect the libel is laid upon a series " of insults and indignities said to have been offered by the

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"Defender to the Pursuer, unaccompanied with personal vio-
"lence, or any menace thereof,—and that, without an allegation
"to that effect, it appears to be settled, on authorities which the
"Lord Ordinary is not entitled to question, that a libel at the in-
"stance of a wife against a husband, founded on such averments
"as those now urged, is not relevant," dismissed the action.

The Respondent reclaimed against this interlocutor. The Court remitted the cause back to the Lord Ordinary, with instructions to open up the Record and appoint the Respondent to give in a special condescendence of the facts she averred in support of her summons, and decerned against the Appellant for 25*l.*, towards defraying the Respondent's expenses.

A condescendence and answer were accordingly lodged; and upon advising these, the Lord Ordinary allowed the parties a conjunct proof of their averments.

Under this leave, the parties produced certain letters which had passed between them and the father of the Respondent, before and subsequent to their marriage.

This correspondence began in April, 1848, with a letter from the Appellant to Mr. J. Russell, of Limerick, the Respondent's father, upon the subject of pecuniary difficulties in which the Appellant was involved. Mr. Russell, on the 14th April, after speaking of these money matters, wrote the Appellant, "You
"ought to think of settling yourself. One of *W. S.* letters
"mentioned something of such as likely, then you would be
"relieved from all your difficulties."

The Appellant, taking this observation as a hint, wrote Mr. Russell on the 27th April, authorizing him to make for him a proposal of marriage to his daughter, the Respondent. On the 1st May, the Respondent answered this proposal, through her father, by a message to the effect that she had a pleasant remembrance of her former acquaintance with the Appellant; but as it was some years since they had seen each other, she would be glad to renew their acquaintance before giving a decisive answer.

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The subsequent letters arranged a meeting in London, whither the Respondent was about to proceed for medical advice to one of her brothers. This meeting took place in the beginning of June, 1843, and the result of it was, that, after a few days of renewed acquaintance, the Respondent accepted the offer of the Appellant, and their marriage took place at London on the 8th of July, 1843.

Agreeable and friendly letters then passed between the Appellant and the Respondent's family. In one of these, written in the end of July, 1843, to her brother, the Appellant thanked him for his wishes and congratulations "as the offerings of a sincere "and deeply valued friend and connection, coupled with my "own knowledge of those estimable qualities which you have "so justly ascribed to your sister."

In the month of October, 1843, the correspondence between the Appellant and the Respondent's father took an unpleasant turn, in consequence of some reference in it to disputes between the Appellant and members of his own family. On the 2nd of October, the Appellant wrote to Mr. Russell, after allusion to these other subjects;—"Now, my dear sir, having disposed of "this subject, I come more particularly to your note of the 14th, "and must freely acknowledge that I have been in a truly "miserable and depressed state of mind ever since my visit to "London. I need not remind you, my dear sir, of our previous "correspondence from the commencement, or of the very pecu-"liar position in which I found myself on my arrival there; "suffice it to say, that immediately on renewing my acquaintance "with your daughter, which, I may remark, had never been "much extended, I began to feel the most powerful misgivings "as to the prospect of happiness to myself, and would, at the "time, have given worlds to have unbosomed my apprehen-"sions to yourself, or some member of your family; but how "could I at that time have done so? The same letter which "covered my proposal for your daughter, covered a most urgent "solicitation to be relieved of some pressing pecuniary embar-

" rassments which were adjusted by you, and my proposal at " same time formally accepted by your daughter, whom I had " been the means of bringing specially to London; when there, " I found my pecuniary resources so low as to render it absolutely " necessary for me to lay myself under further pecuniary obli- " gations to your sons, who no doubt supplied my wants on the " strength of the position in which I then stood to them. What, " my dear sir, would have been said or thought of me, if, at that " period, after having my pecuniary wants supplied, and after " being formally accepted, if I had ventured, unsolicited, to " explain my depression of spirits, or mention the state of my " feelings? It would have put an end to my union with your " daughter; but what, my dear sir, would have been said or " thought of me? It was too fearful to contemplate; and I " was only left to proceed in the fond and anxious hope, that " when I got quietly settled at home, and the first impulses of " disappointment subsided, I might still, by the exercise of goo " sense, and the imaginary strength of my own mind, restore " peace to my then convulsed heart. The state of mental unhap- " piness and depression under which I laboured, became visible " to your entire family, from the date of my arrival; my cold- " ness of manner, avoidance, and general deportment, were too " apparent to be misunderstood, and became the subject of " remark amongst them: but no explanation was sought from " me; I had no private conversation or intercourse with any " member of them, beyond the mere business preliminaries. " I fondly and anxiously looked for your arrival, in full expec- " tation that, under all the circumstances of our previous cor- " respondence, your assiduities, as a fond and attached parent, " would have caused you (more particularly on account of our " not having met for five years) to have indulged in a little " private conversation with the man to whom your daughter was " about to be united, to have ascertained the true state of his " feelings, and the grounds upon which you might rest your " hopes of happiness for us both. Had you afforded me such

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" an opportunity, painful as the task would have been, my appre-
" hensions would have been unbosomed, and I would have
" relied on your kindness and known discernment to have taken
" such a course as might, under the circumstances, seem best.
" But, my dear Sir, I was grievously disappointed; from the
" moment you arrived to the moment of my departure, there
" was an evident avoidance on your part—you never communi-
" cated or held an instant's conversation with me, beyond the
" common-place observations at table; the last, and I might
" almost say the only remark in reference to my marriage,
" which fell from you on my taking my departure, being, that
" 'you need not say what reliance you placed on my honour.'
" Would that it were on the strength of my attachment to your
" daughter that you could have so expressed your reliance! It
" would be wretched indeed for me to say that I had no hopes
" of happiness; had such been the case, feelings of respect for
" your daughter alone would have impelled me, at all risks, to
" break off, but as I previously observed, in the midst of my
" distress, I was not without hope, and placed a fatal reliance
" on the strength of my own good sense, stability of mind, time,
" and circumstances, to bring about a happy change of sentiment
" and feeling—is it too much for me, my dear Sir, to say, that
" you also relied chiefly on the same fatal grounds? I have
" now done with my sojourn in London, and I regret to say,
" without any disparagement to the naturally good and kind
" dispositions of your daughter, that the occurrences on our
" journey thither did not at all tend to improve my hopes of
" happiness, which at best was but a tender plant; every
" hour, every incident, every sentence uttered, tended more
" and more to convince me how entirely unsuited we were to
" each other; my depression of spirits continued, and I regret
" to be obliged to say, that I see not the most remote prospect of
" any change calculated to restore even a shade of happiness to my
" mind. It is in vain to talk to me of exertion; no man has ever

" struggled harder than I have to overcome the fixed depression " of heart and mind which hangs upon me; and if there is any " circumstance which can aggravate my pain, it is the con- " sciousness that I have removed your daughter from among a " widely-extended circle of attached relatives and friends into a " house of sorrow, where, I am aware, she neither is or can be " happy. It must be evident to you, my dear Sir, that I would " not for any idle or senseless whim or caprice, allow myself to " shrink from the performance of duties which I freely ac- " knowledge to be due of me, when the result of my incapacity " to resist this depression is the sacrifice of all that is dear in " life, the ruin of my prospects, and the utter annihilation of all " interest in this place and property, where all is now a blank " to me, and only serves as a monument of that bitter disap- " pointment which I am inevitably doomed to suffer. Circum- " stances which, when properly weighed and considered by the " members of a just, amiable, and upright family, will, I trust, " render me rather an object of pity than reproach.

" You are of course aware that Francis Russell has been " here for a few days, having, as I understood from him, come " specially in consequence of the unhappy state in which " Elizabeth very justly represented herself to be; and further " to expostulate respecting some portions of my conduct of " which she complained. I need scarcely tell you that, with " the exception of some few remarks unjustly involving the " name of my unoffending sister, he urged all that could be " said by a gentleman and a Christian. Would to God my " diseased mind were in a state to adopt the suggestions " advanced by him, founded as they were, upon all that is " amiable and good in the performance of Christian duties; " but alas! my dear Sir, he knows not the canker-worm which " gnaws my vitals."

Again, on the 20th of November, 1843, the Appellant wrote Mr. Russell.

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"That there exists now, as at all previous times, an involuntary avoidance and coldness, I cannot deny; everything she says, and everything she does, is so distasteful to me, that I almost imperceptibly shrink from those attentions which may be expected from me. I have declined all invitations, and wish to be left as much to myself as possible, to be permitted to bear my sufferings in private; and did encourage a hope, that though I might be condemned, the acuteness and depth of my mental misery and disappointment might have enlisted some portion of commiseration at the hands of your family, who were witness to the same cold avoidance before my marriage, which now characterizes my conduct, and which was so plainly and so broadly indicated to Elizabeth herself, that she must have possessed more than ordinary resolution to encounter that which evidently lay in the path chosen for her."

On the 26th December, 1843, the Appellant again wrote Mr. Russell.

"I observe what you say respecting the family in Cork, but as we cannot regulate our hearts and feelings by rule or precedent, it is needless for me to mark the distinction between cases which, in my opinion, bear no analogy to each other. You have very justly, as you say, looked upon me as a man, and not a boy; but you must be aware that the feelings and passions of a man are more obdurate, more fixed and unalterable, than are those of a boy, who can hate to-day and love to-morrow; and if I had ever loved or ever breathed affection for your daughter, you might justly accuse me of boyish caprice and want of steadiness, but, my dear Sir, you know well that such was not the case, but the very reverse, and I ought therefore to be treated with consideration, if I cannot now make feelings for myself, and manufacture an attachment to suit my pecuniary views. As to a separation, to which you have more than once alluded, I can only say, that we are as much separated now as if she were living under the roof of

"her parents; we have separate apartments, separate feelings, "and, I may add, separate interests, for she declares herself "openly against my interests, views, wishes, and intentions, "upon all occasions; separate correspondence, for we know not "to whom the other writes, or from whom they hear, and are "constantly guilty of writing the same day to the same parties, "ignorant alike of the facts or the contents. This, you will "admit, is by far a more discreditable separation than if distance "were added. It would be doubly cruel in me to act the "hypocrite, and make a temporary display of an opposite feeling "for the purpose of obtaining from you those advantages which "you have held out. I therefore openly avow the truth, and declare "at once the utter impossibility of my *ever again returning to her* "*apartment*. There can be no restoration of happiness which "never existed. I never knew a moment, either prior or sub-"sequent to our unfortunate marriage, when there existed a "union of thought, feeling, or action; had there ever been, "there might be hope, but there never was. There is no resti-"tution in my power, no sacrifice that I would not willingly "make to alleviate your feelings and those of her family, for "any injury I may have done by the steps to which I have "been led by the wretched state of my affairs; but my heart "or my feelings I cannot command."

On the 19th January, 1844, in consequence of having learned that some of the Respondent's family intended paying her a visit, the Appellant wrote Mr. Russell:

"You Sir, on your part, have violated all your solemn "written promises and engagements; you have not fulfilled the "conditions held out to me previous to my marriage, and upon "the faith of which I was induced to accept your daughter; "under these circumstances, I must now tell you for the last "time, that I will not receive your party, or permit one of them "to enter my door. I proceed direct home, and shall, with the "blessing of God, make such arrangements as will enable me

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"to defend my house from any invasions that might be "attempted. I shall be glad to see the person who will dare "attempt to force an entrance into my dwelling. As a matter "of duty and caution, you will, of course, hand this letter to "any member of your family who may think of venturing on "this ill-judged expedition, so that they may at least be pre-"pared for the reception that awaits them."

The Respondent likewise examined the domestic servants who had lived in the Appellant's house, from the time of her marriage until she left her husband's house.

One of these servants, who had waited at table, deposed that for a short time after the marriage, the Appellant occupied the same bed with the Respondent, but that after a few weeks he went to a separate bed-room, and never again returned to sleep in hers. That the Appellant and his sister usually sat throughout the day in the library, the Respondent being left in the dining-room; that when the Appellant went out he was accompanied by his sister, and the Respondent was left alone in the house, and she appeared to be distressed at being left alone in that way.

Another servant who also waited at table said she saw the Respondent crying every day; that when she first went to the house, the Appellant and Respondent talked a little during dinner, but not afterwards; and while she was in the house they did not converse together: that the Appellant sometimes talked to his sister during dinner, sometimes not: that one time when the Appellant had been from home, the Respondent when he returned, went to the door and offered to shake hands with him, but he passed on and would not shake hands with her, and she went half an hour afterwards to the dining-room, and found the Respondent there crying: that the Appellant's sister went away and returned with him, and she came in first and shook hands with the Respondent: that during the Appellant's absence the servants had no occasion to complain as to the supply of

provisions, but whether the Respondent had reason to complain she did not know; she, the Respondent, kept the keys herself: that when she first went to the Appellant's service he and his sister used to sit in the dining-room after dinner till about bed-time with the Respondent, but before they went from home they gave up that practice and left her alone invariably immediately after dinner and before the dishes were removed, or whilst she was taking them away; that the Respondent appeared distressed at being so left, and she had seen her crying, both in the evenings and in the mornings very often, and sometimes she was not able to speak for crying, but she did not recollect ever seeing her crying in the Appellant's presence; that there was a piano-forte in the dining-room, where the Respondent sat, on which she used to see her playing, and she was also in use to play on an accordion. That the Respondent acted as a mistress, and took the management of the house; she had the keys of the store-room and of the dairy; she told her anything she wanted done about the house, and she obeyed her as mistress. She sat at the head of the table opposite to the Appellant, and he helped her just as he did his sister. That while the Appellant and his sister were away, the Respondent went to visit some families in the neighbourhood in a carriage and pair, which she got from the hotel at the neighbouring village.

Other female servants who were in the Appellant's service at the same time, and for some time afterwards, gave accounts very similar in character of the intercourse between the Appellant and Respondent, and its effects upon the Respondent's spirits. One female servant swore in particular that the Respondent had charge of the household matters, and kept the keys, and gave out what was necessary to the servants, and ordered things required for the house by directing the cook to send for them, and there was always plenty in the house. She never heard the Appellant oppose anything the Respondent wished for. She never heard high words between them. The

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Respondent was always treated by the servants respectfully as mistress of the house, and always sat at the head of the table at meals; that the Appellant read the Church of England service on Sundays, and the Respondent and the servants were present, the parish church being eight or nine miles distant. Another female servant, after confirming the previous testimony as to the Respondent's position as mistress of the house, swore that she never saw the Appellant ill-use the Respondent.

Upon considering this evidence, the Lord Ordinary made avizandum with the cause to the Inner House, and accompanied his interlocutor by a note, in which were the following observations?

"I. It is submitted that the first question for consideration "is, whether any case of maltreatment has been made out to "justify the interference of the Court between the parties, to "any effect? And on that part of the case, if the facts before "detailed, as established on the face of the parole and written "evidence, be correctly deduced, it is supposed that little doubt "can be entertained. It is true that the Defender did not "actually turn the Pursuer out of his house; but he did what "was worse, he deserted her bed, wrote to her father that this "was a deliberately formed and perpetual alienation, which, in "the state of his mind and feelings he could not control, and "he showed by every act in his demeanour, from hour to hour, "and from day to day, that his wife was to him an object of "aversion, hatred, and scorn. No woman is bound to submit "to such a system of insult and downright barbarity, which, as "remarked by the Defender himself, is all the worse that it "was inflicted at home, and not at a distance. Indeed, it is "obvious that no wife, with the feelings of a woman, could "endure such treatment for any length of time, without sinking "under it. It can only be assimilated to the remorseless "cruelty said to be practised in savage nations, where their "victims are said to be destroyed by constant drops of water

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"poured on their head, until they expire by the agony and "exhaustion of unceasing torture. It is manifest that great "effect is due to any rules or analogies of law that afford "protection to parties against a wrong so grievous and insup-"portable.

"II. In considering the species of redress appropriate to "such a case, it is supposed to be only necessary to enquire, "whether the law of Scotland does not of itself afford principles "amply sufficient for the relief that is sought, without regard "to the practice in other systems, different in their policy and "enactments from our own? Under this head in particular, it "is apprehended that no reference can be safely made to the "English law and practice, which have been chiefly founded on "by the Defender. There is no subject on which the laws of "the two countries so widely diverge, as on the subject of "marriage, which a short view of the two systems will suffi-"ciently demonstrate.

"For many centuries, when the Catholic religion prevailed "throughout Europe, marriage was regarded as a sacrament, "and on that account the tie was held indissoluble by any civil "magistrate or Court. The union might, in rare cases, be "dissolved by a dispensation from the Pope, but not otherwise. "At the Reformation, the English, though not recognizing "marriage as a sacrament, did not enlarge the powers of their "Courts in that class of cases; and hence neither their Civil "nor Consistorial Courts had any jurisdiction to divorce married "parties, however aggrieved, *a vinculo matrimonii*: their powers "being limited to divorces *a mensa et thoro*, and that only for "adultery or cruelty. The power of dissolving the matrimonial "tie to every effect was afterwards assumed in England by "Parliament in cases of adultery, under their paramount powers "of legislation. A divorce, however, for desertion or non-"adherence was unknown in the sister kingdom, and incom-"petent in any tribunal.

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"But marriage was always a civil contract in Scotland. At "the Reformation, the Presbyterian reformers in this country and "in Holland, and perhaps in a few other places in Europe, dis- "sented more widely on this subject from the Church of Rome. "Stimulated, perhaps, by a more fierce opposition than the "Lutherans to all the dogmas of Catholicism, they not only did "not regard marriage as a sacrament, but held the tie dissoluble "on just cause by the competent tribunals; and they allowed "divorces both for adultery and for non-adherence, holding the "latter remedy to be warranted by the divine law, in a chapter "of St. Paul (1 Cor., c. 7), which has given rise to much contro- "versy. The Scottish legislators put their own construction "on the Scriptures, and passed the Act 1753, c. 5, enacting that "in all time coming a divorce (according to certain forms unne- "cessary to be detailed), should be competent before the Civil "Courts on the ground of non-adherence, after a desertion of "four years, and that the offending party should forfeit all "interest in the goods in communion. This statute is daily "acted on with us; and it is believed that it has not been found "prejudicial to the morals of the people, by affording too much "facility for the dissolution of marriage. At all events, as the "English have no such law, the questions arising under our "statute must be determined by the principles of our own law, "and not by those of another system, which does not recognize "the same conjugal rights.

"The authorities in our practice, in cases of separation, are "generally fully detailed by Mr. Fergusson in his Commentaries "on Consistorial Law (p. 175, &c.), and by Mr. Lothian in his "short and valuable Treatise on the Law and Practice in Con- "sistorial Actions (pp. 196—201), to which it is sufficient "generally to refer. The present, however, is a case, *sui generis*, "not precisely parallel in its circumstances with any of the "reported cases on record. But it is to be considered, if the "principles of our law of marriage do not clearly support the

"action now brought in name of the Pursuer, under the cir-
"cumstances here established, more especially when confirmed
"by the documents under the hand of the Defender himself?
"This leads to the last head of inquiry now to be suggested.

"III. On the assumption that no wife could be required to
"live in her husband's house exposed to his persevering dis-
"regard of his marriage vows, and to the daily contumely and
"insult with which she was treated, her departure from the
"house must be held, not as voluntary or capricious, but as a
"compulsory expulsion which she could not control, and was
"bound to yield to. When that also is accompanied by an
"acknowledgment under the Defender's hand, that 'it is an
"'utter impossibility' that he can ever restore the Pursuer to
"her conjugal rights, it is thought that she acquired rights
"from the peculiar tenor of our laws, to which it is difficult to
"refuse effect.

"Whatever may be the law of England, it has long been
"established with us, that desertion or non-adherence by either
"of the spouses to the other, is a high crime and misdemeanour
"in matrimonial law. It is in fact a *delict*, in which, if the
"guilty party persists for four years, his crime is placed in the
"same category with adultery, and entitles the injured party to
"the last and highest remedy competent to a married party
"against an offending spouse. But if so, when the offence of
"non-adherence is commenced, and when it is proved under
"the hand of a Defender himself, that he is never to adhere,
"from that time and thenceforward, it is apprehended that the
"wife is not bound to reside in the house with her husband,
"slighted and insulted by him and his family every hour. And
"hence, the husband is bound to provide suitable aliment for
"the wife in a separate residence.

"Different analogous cases may be figured, but one will
"suffice. Suppose the Defender, then, had followed a different
"course, evidently more consistent with delicacy and duty to a

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" lady whom he had so grossly injured, than that which he " took, and that he had, after his desertion of her, assigned a " separate house to her, on the declaration that he could no " longer fulfil his marriage vow, and had resolved not to do so; " surely it cannot be doubted, that in that case the Defender " must have paid an aliment to his wife, in another house, " suitable to his fortune and station. That was admitted in the " case of Sir James Colquhoun in 1804 (*Mor. App., voce* " husband and wife, No. 5); and, indeed, it was the chief " ground of the decision, that the husband could provide a " separate house for his wife, and exclude her from his own, " though the remedy of an action for aliment and afterwards of " non-adherence would be always open to her.

" But can any husband make a profit to himself, by with- " holding a separate residence and aliment from an injured wife, " and giving her in lieu thereof a grudging sustenance at his " own table, with contumely and insult? This would be " shocking in any case, but more especially is it so in one " where the wife was inveigled into the marriage in the first " instance, on mercenary views by the offending party, who " keeps her dower, and will not give his unfortunate wife a " farthing out of it for her maintenance. According to every " principle of law and honour, he was bound, in the circum- " stances, to give a most ample aliment to a wife whom he had " so deceived, though he himself had lived on a crust of bread.

" It may be argued, however, that the present is not an " action of divorce for non-adherence, commenced under the " Act 1573, on the elapse of four years after desertion,—but a " process of aliment and separation, *a mensa et thoro*, brought " within less than a year after desertion (May, 1844). But this " action was adapted to the wrong sustained and to the neces- " sities of the Pursuer,—at the date of the action. She then " required aliment; and if there was any objection or doubt, as " to the conclusion for separation, up to that period it is

" apprehended that the Pursuer was, at all events, entitled to " aliment, superseding the conclusion for separation, till the " expiration of four years.

" That period has now elapsed; the Defender has been " guilty of four years' desertion of his wife; so that the con- " clusion for separation as well as aliment, in respect of the " non-adherence, seems now to be relevant and unexceptionable.

" It cannot be successfully maintained, it is supposed, that " the statute 1573 does not authorize separation, but divorce " only. It is sufficient to answer that *minus inest majore*. " When a divorce is competent, the spouse is not obliged to " pursue for the greater forfeiture. Accordingly, though a " divorce may be sued for adultery, the injured party may, " nevertheless, rest satisfied with the lesser remedy of sepa- " ration *a mensa et thoro*. Such cases have often occurred, and " been entertained without objection, so as to make their com- " petency part of the common consistorial law of Scotland. " See the cases on this point perspicuously abridged by Pro- " fessor Bell in his *Illustrations*, Vol. II., p. 257.

On the 24th of January, 1849, the Court pronounced the following interlocutor, "decern against the Defender, in terms of " the conclusions of the summons, for having it found and de- " clared that the Pursuer may have full liberty and freedom to " live separately from the Defender, and for ordaining him to " separate himself from the Pursuer, *a mensa et thoro*, in all time " coming: Find the Pursuer entitled to the expenses of process " hitherto incurred, in so far as not already decerned for: Ap- " point an account of expenses to be lodged, and remit to the " auditor to tax the same, and to report; and before answer as " to the question of aliment, ordain the Defender, within four- " teen days from this date, to give in a special condescendence " of the amount of his means and estate."

The Appeal was taken against this interlocutor and the previous one, recalling the interlocutor of the Lord Ordinary, which dismissed the action.

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Mr. Rolt and *Dr. Harding* for the Appellant.—Mr. Rolt had opened the pleadings, when he was interrupted by the House.

[*Lord Brougham.*—There is no allegation whatever, on which the judgment can be supported.—The House would rather hear the other side, as at present there is nothing for it to attend to. —We will hear Dr. Harding in reply, should it be necessary.]

Mr. Turner and *Mr. Anderson* for the Respondent. The law of Scotland is different from that of England in regard to marriage. In Scotland it is a contract, which the Courts carry out accordingly. The separation, *a mensa et thoro*, is merely a temporary arrangement when the conduct of the husband is such that the wife cannot reasonably be expected to live with him. Even in England, cruelty short of actual violence has authorized divorce, *a mensa et thoro*. And in Scotland the cases are clear upon the subject. In Gordon *v.* Gordon, *Mor.* 5902, the complaint of the wife was that the husband refused her money for necessary uses, that he debarred her from interference in her daughter's education, that he shut her out of his lodgings at night, and held scandalous and familiar intercourse with a waiting-woman, and the Court allowed the aliment and maintenance.* In Letham *v.* Letham, 2 *Sh.* 284, separation was decreed because the husband allowed a woman to continue in his house, although he had had carnal intercourse with her before marriage. And in Shand *v.* Shand, 10 *Sh.* 384, the Lord Justice Clerk observed, "I "never can accede to the proposition, that the only legal "ground of matrimonial separation must rest on personal "violence. That is not the law of the country—and I will "venture to say it is not the law of any civilized land. A "train of maltreatment may occur in the married state— "to be viewed and weighed according to the *status* of the

* As reported in *Mor.* there does not appear to have been any judgment at all.

"parties in society—perfectly sufficient to found a claim of "judicial separation, without an approach to personal violence." These cases, and the doctrine laid down in Fergusson, *Con. Law*, p. 182, show that conduct short of personal violence will justify separation. In Baillie *v.* Murray, referred to by Fergusson, the ground of separation was groundless and incurable jealousy, accompanied by accusations and inquiries of the most injurious description; and Lothian, *Prac. of Con. Courts*, says, there are cases in which separation has been pronounced, where there was no violence, but threats, degrading restraints or accusations, or licentious and insulting conduct. *Ersk.* I. 6, 19, says, if the husband offer such indignities to the wife as must render her condition quite uncomfortable, separation and aliment will be allowed, till there be either reconciliation or a divorce. *Bell's Prin.*, sec. 1540, speaks of continued annoyance wearing out and exhausting the party. All these authorities show that violence or adultery are not the only causes which will authorize separation.

Such being the law, the facts in the present case show an avowed determination not to perform the contract, by a system of conduct, not amounting to violence certainly, but, in truth, of a worse character. The Appellant avoids contumelious or insulting expressions, that he may not bring himself within the Scotch cases, and endeavours, as he supposes, to keep himself within the limits which the law allows him with impunity; but his conduct is one of silent cruelty, intended, sooner or later, to break the heart of the Respondent.

The principle of the law of Scotland, however, is that the contract shall be honestly performed, by the discharge of those duties and obligations undertaken at entering upon the marriage state, and which are the grand objects of the contract; otherwise there shall be a separation, not for ever, but as a temporary measure, which leaves it open to the party, upon a change of his conduct, to sue for adherence. It never can be

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said, where a husband refuses cohabitation with his wife, or to hold conversation, or any kind of society with her, that he is performing the contract of marriage.

LORD BROUGHAM.—My Lords, in this case I wish very much to have the benefit of hearing Dr. Harding upon one point. I am quite clear that this case cannot stand. I have no doubt whatever about that—but it may be well to hear Dr. Harding upon the point I shall mention—and if it would suit his convenience to come to-morrow morning, it would be more convenient, I presume, to the other learned counsel, that we should not go further to-day.

This is a very important case in point of principle, and although I shall, as at present advised, move your Lordships to reverse the interlocutor complained of, yet I am by no means prepared to set up the interlocutor of Lord Cuninghame, the learned Lord Ordinary, pronounced in the first instance, dismissing the suit upon the ground that, by the law of Scotland, as well as by the law of England, the ground of the remedy is confined to personal violence. That is not the opinion that I have, either of the law of Scotland, or of the law of England, but it must be such maltreatment generally, such cruelty of conduct, not confined to mere battery, or assault, or threats of battery or assault, but grossly cruel conduct and maltreatment, and which may, after all, in the cases I have put, be confined merely to words, may rest in parole, but yet may make it utterly impossible for any woman, having the feelings of a woman, to live with her husband. That is the impression that I have of the law of England, and I am quite clear as to the law of Scotland; therefore I cannot go along with Lord Cuninghame in the reasons which he gives for the interlocutor as recorded.

I must, therefore, take care that your Lordships do not, in reversing the ultimate decision of the Court below, set up

that erroneous interlocutor. The judgment may be to reverse, and to dismiss the suit, without setting up that interlocutor. I shall, when I move the judgment, state the grounds of my opinion, and I don't now feel it necessary to call upon Mr. Rolt for a reply. But, meantime, I should like to have the benefit of Dr. Harding's arguments, confined to one point, namely, how far the law of England is as I have stated my impression of it—not strictly confined to the case of actual corporal violence, but extending to cases of other maltreatment of so gross and grievous a nature as to make it impossible for any woman to live with her husband—and I do not know that the husband might not have the same remedy reciprocally against the wife; but into that question it is unnecessary now to go. Dr. Harding, you will be able to go on to-morrow morning?

Dr. Harding.—I am afraid, my Lord, that I shall be hardly able to establish the point that bodily violence is necessary in England to make a ground of divorce.

Lord Brougham.—Do you say that you shall not be able to establish that point?

Dr. Harding.—Yes, my Lord.

Lord Brougham.—Then I shall not trouble you. If you were able to establish that point, it would lead me to reconsider Lord Cuninghame's interlocutor. I am convinced that the law is nearly, if not altogether, the same in the two countries. We have not gone so far here in any one case as they have gone in one or two cases in Scotland; but I am confident, if you examine it, there will not be found any very material difference between the two systems.

Dr. Harding.—Danger to life and health may be a ground in Doctors' Commons. Health and life may be endangered without bodily violence.

Lord Brougham.—Would not you go a step further, and say, suppose a man were continually charging his wife with

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serious offences against morality—suppose even worse—that he charged her with theft, with attempts to murder him, with adultery, with fornication, in short, with every sort of criminal as well as grossly immoral conduct, and that there was not the shadow of a foundation for those charges—that they were only the results of a determination to wear her out, and to "break her heart," according to the expressive phrase used by Mr. Turner (but which I do not think applies in this case), accompanied with declarations that he would see the end of her—not by killing her, but by making her a broken-hearted woman, I should say that it would be utterly impossible for a woman to live with a man under such circumstances, for no promise of amendment could be at all relied upon by your Lordships, or any Court, in such a case. I admit, however, there is no case, as far as I know, that comes up to this. Just consider this view of the matter, before to-morrow morning. Then as to costs. You know it is not, in Doctors' Commons, the same when the wife sues as when the husband sues; he must pay the expenses of the wife's defence, and also of the wife's appeal against the judgment.

Mr. Anderson.—Perhaps your Lordship will say nothing upon that point, because there may be a question here as to whether or no (as in several cases the Courts have held), there is anything like a probable case.

Lord Brougham.—Is that the rule in Scotland?

Mr. Anderson.—Yes, my Lord—so that, perhaps, your Lordship will say nothing about that.

Lord Brougham.—I will save that point.

Mr. Anderson.—If your Lordship pleases.

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LORD BROUGHAM.—My Lords, this case comes by appeal from two interlocutors of the Court of Session, one of which

altered the interlocutor of the Lord Ordinary, and remitted the case to him to proceed and take proof, he having decided against the relevancy of the summons, and against going further, and having dismissed the suit. I shall presently state in what way I differ from the view taken by his Lordship. The other interlocutor is that which was pronounced by the Court after the case had been remitted to the Lord Ordinary with instructions to proceed, and after the proof had thereupon been taken by his Lordship, and reported to the Court. The Court decreed for the remedy prayed, and not only ordered a separation *a mensa et thoro* in terms between the parties as prayed, but likewise postponed the consideration of the question of alimony, to follow upon that decree of separation, until an account should have been taken of the means of the Defender, the present Appellant, to pay that alimony. These two interlocutors are appealed from; and it is now for your Lordships, after having heard the case argued at the bar fully for the Respondent, not so fully for the Appellant, in consequence of my wishing to hear what could be said in support of the decision below, which had been impeached by the argument of the leading counsel for the Appellant, and after having had the assistance of the learned civilian, who also appeared for the Appellant, on the bearing of the English law on questions of this kind, it is now for your Lordships finally to dispose of the case.

My Lords, I agree with the learned Judges of the Court below, if on no other matter in the cause, at least in this, that the cause is of a somewhat novel description. I have never known either in English or in Scotch judicature any one at all similar to it. I also agree with the learned Judges that it presents features of a somewhat painful aspect, and shows in a somewhat repulsive form the conduct of one of the parties, in extenuation of which, however, there is not a little to be urged.

It appears that Mr. Paterson, having been laid under obligations to Mr. Russell of a pecuniary nature, had, in the course of

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the communications which took place in consequence of his embarrassments, become attached, or at least apparently attached, to Miss Elizabeth Russell, the daughter of his benefactor; that he proposed marriage to her, and having gained her affections, was accepted by her family as a husband; that the marriage was solemnized; that it was consummated, and that they lived together as man and wife for somewhere about four months. It appears that some degree of disgust, or at least great coldness, almost amounting to a dislike, arose in the mind of the husband soon after the marriage. If we take his own word for it as given in a letter to his father-in-law, we find that he had, even before the marriage was solemnized, begun to entertain feelings towards his future wife very different from those with which he had presented himself before her when he sought her hand; that he looked upon the contemplated match as not likely to give him happiness or even comfort, and that he nevertheless, instead of frankly disclosing the change which had thus taken place in his mind—instead of letting the father know that he no longer expected happiness from the connection which he had sought—instead of disclosing, too, that it could no longer conduce to the happiness of his wife, he kept all this to himself, and was married. In explanation of what cannot be justified, he says that he wished to see the father, but by accidental circumstances was prevented from obtaining an interview, as if there were no paper to be had upon which he could write, or as if it were a matter too delicate to be committed to paper, and which could only be communicated personally. He makes no effort to save this unfortunate lady from the misery of a connection which he knew must lead to no other result. The marriage is solemnized, and the parties cohabit for four months. Then begins a separation entirely from the society of his wife. Then begins a correspondence with the father-in-law, in which he attempts to explain his conduct, further making the assertion that he can no longer endure his wife's society, avow-

ing, without imputing any blame to her, that he will never again on any account be induced to cohabit with her, but must for ever separate himself from her. He adds many other expressions respecting the misery which he feels, the state of low spirits, his mental depression, for which, though he may be the object of pity, yet is he certainly greatly to blame, because he most imprudently brought his partner as well as himself into the misery resulting from this; his only excuse being, that he was under pecuniary obligations to Mr. Russell, and did not like to interrupt an intercourse which he found gainful, by breaking off the match, and in all probability, also, losing the source of those accommodations derived from the kindness of his wife's father.

Now all this may be accounted for, though it cannot be excused, by the peculiarity of the man's constitution, and his necessities at the time, but undoubtedly he alone is not the only victim of those circumstances, and of his grossly imprudent conduct (to give it no harsher name); she is the victim also—she, to whom no blame whatever, even for indiscretion, can be imputed; she is the innocent sufferer in this case; and with respect to her the feelings of the Court below appear to have been, not unnaturally, I may say almost unavoidably, awakened. In those feelings I heartily concur. But, my Lords, a Judge has no right to indulge his feelings—no right to entertain any feelings, which can in any, the slightest degree, affect his judgment. He must not feel for one party or the other, nor know any desire, any sentiment, except a fixed resolution to administer justice, stern and unbending, between the two; justice, according to the stern and unbending letter of the law, whose organ he is.

If their Lordships in the Court below had thus viewed the nature of the judicial office, I do not think it possible that we should have read the opinions of three of the four learned Judges who have decided this cause as we now read them, and

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I do not think it would have been possible to pronounce the interlocutor now appealed from. I yesterday stated in the course of the argument an example of the exaggerated language in which one of their Lordships states the facts of the case. I need not recur to it; a supposition is made, not borne out by any one part either of the proof or even of the allegations in the summons and condescendence, clearly showing that the natural feelings of the very learned Judge carried him away in his comments upon the cause.

But I have now the task of dealing with the foundations upon which this judgment must rest, and of stating, with your Lordships' permission, what the law is, in order to show that the Court below has widely departed from an accurate view of it. Personal violence, as assault upon the person of the woman; threats of violence, which induce the fear of immediate danger to her person; maltreatment of her person, so as to injure her health; these are, both by the law of Scotland and the law of England, a sufficient ground of divorce, *a mensa et thoro*. Furthermore, any conduct towards the wife which leads to any injury, either creating danger to her life, or danger to her health, that, too, must be taken as regarded by the law of Scotland and by the law of England, a sufficient ground of divorce. It is not true, as the learned Judges have stated in the Court below, that the law of England stops short at personal violence, and requires either actual injury to the person, or a threat of such injury, in order to constitute a ground of divorce. Although there be no actual violence offered, and no menace of violence held out, the wife may yet obtain a divorce from the bed and board of her husband, if he shall, by such conduct as places her life, or even only her health, in jeopardy, render it impossible for her safely to consort any longer with him in the marriage state. How far the Consistorial Courts of England could go beyond that, I am not prepared to say, because when I find it laid down by that most learned and eloquent Judge,

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Sir William Scott, that something short of personal violence, something short of even menace of such violence, may be sufficient ground of divorce, yet when he goes forward to state what cruelty short of that may be sufficient, he appears almost to consider that injury to the life or health, in short, some grievous bodily injury, either inflicted or immediately approaching from the party's conduct, is necessary to sustain the divorce. For example, in Evans *v.* Evans, 1*st Haggard*, 69, he says, "It "is pleaded, that while Mrs. Evans was in a very weak and sickly "state, Mr. Evans accustomed himself, in the most unfeeling "and cruel manner to distress her, and increase her pain, by "making a violent noise with a hammer, close to her. I had "very great doubts," he says, "about admitting this article. "I admitted it upon an idea suggested naturally enough by the "words, that this gentleman came, without any reason whatever, "with a heavy massive instrument, to make a loud noise, quite "close to the head of a very sickly and infirm person." "I do "not believe that it could have entered into the conception of the "most ingenious person in this Court to have imagined that "this meant Mr. Evans making a very slight noise, only "tormenting her." And in another part of the case the learned Judge says, that in all these instances (and the Court, he adds, has never yet gone beyond it), there has been, as an ingredient in the alleged cruelty, an actual danger to either life or health, or something which tended to endanger the health, as a parcel of the cruelty. He says, in page 37, "What is cruelty? In the "present case it is hardly necessary for me to define it; because "the facts here complained of are such as fall within the most "restricted definition of cruelty; they affect not only the "comfort, but they affect the health and even the life of the "party. I shall therefore decline the task of laying down a "direct definition. This, however, must be understood, that it "is the duty of Courts, and consequently the inclination of "Courts, to keep the rule extremely strict. The causes must

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"be grave and weighty, and such as show an absolute impossi-
"bility that the duties of the married life can be discharged.
"In a state of personal danger no duties can be discharged;
"for the duty of self-preservation must take place before the
"duties of marriage, which are secondary, both in commence-
"ment and in obligation; but what falls short of this is with
"great caution to be admitted. The rule of '*per quod con-*
"*sortium amittitur*' is but an inadequate test; for it still
"remains to be inquired, what conduct ought to produce that
"effect? whether the *consortium* is reasonably lost? and whether
"the party quitting has not too hastily abandoned the *consor-*
"*tium?* What merely wounds the mental feelings is in few
"cases to be admitted, where they are not accompanied with
"bodily injury, either actual or menaced. Mere austerity of
"temper, petulance of manners, rudeness of language, a want
"of civil attention and accommodation, even occasional sallies of
"passion, if they do not threaten bodily harm, do not amount
"to legal cruelty; they are high moral offences, in the marriage
"state, undoubtedly; not innocent, surely, in any state of life,
"but still they are not that cruelty against which the law can
"relieve." "And if it be complained that by this inactivity of
"the Courts much injustice may be suffered, and much misery
"produced, the answer is, that courts of justice do not pretend
"to furnish cures for all the miseries of human life. They
"redress or punish gross violations of duty, but they go no
"farther; they cannot make men virtuous; and as the happiness
"of the world depends upon its virtue, there may be much
"unhappiness in it which human laws cannot undertake to
"remove." "In the older cases of this sort," he says, "which
"I have had an opportunity of looking into, I have observed
"that the danger of life, limb, or health, is usually inserted as
"the ground upon which the Court has proceeded to a separa-
"tion. This doctrine has been repeatedly applied by the Court
"in the cases that have been cited. The Court has never been

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"driven off this ground. It has been always jealous of the "inconvenience of departing from it, and I have heard no "one case cited in which the Court has granted a divorce, "without proof given of a *reasonable apprehension* of bodily "hurt."

The cases to which I have been referred by the learning of Dr. Harding, lead me to this general conclusion, that the matter rests now upon the decision, as far as the authorities go, in Evans *v.* Evans, and that portion of it which I have now read, not on the principal point in the case. Negatively, we may say there is no case which in decision goes further than Sir William Scott there goes; but nevertheless there is so much *dictum*, there are so many opinions or inclinations of opinion ventilated, which have a tendency to go further, that if a case were to arise such as that which the ingenuity of some of the learned Judges in Scotland supposed, I have very little doubt that we should find the rule considerably extended, and that that which only now rests upon opinions more or less distinctly expressed in the shape of *dicta*, would assume the form ultimately of decision, namely, that if the husband without any violence, or threat of violence to the wife, without any maltreatment endangering life or health, or leading to an apprehension of danger to life or health, were to exercise mere tyranny, constant insult, vituperation, scornful language, charges of gross offences utterly groundless; charges of this kind made before her family, her children, her relations, her friends, her servants; insulting her in the face of the world and of her own domestics, calling upon them (which is one of the cases put below), to join in those insults, and to treat her with contumely and with scorn; if such a case were to be made out, or even short of such a case, any injurious treatment which would make the marriage state impossible to be endured, rendering life itself almost unbearable, then I think the probability is very high that the Consistory Courts of this country would so far relax the rigour of their negative rule, at

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present somewhat vague, as to extend the remedy of a divorce *a mensa et thoro*, to a case such as I have put.

Nevertheless, how can I, as some of the learned Judges below have done, conclude at once, even from assuming the existing law to cover such a case, that therefore in the case at bar the remedy is competent, merely because circumstances have been figured in which it would be competent, when none of these circumstances are here to be found proved, or even alleged? Let us, however, look to the law of Scotland, for it is by no means clear that even now the law of Scotland takes so strict a view of this subject as the English law. Let us examine, therefore, the authorities of that law, which must decide the present case, supposing the facts to exist. And first with respect to the text-writers, I need hardly speak of them, for the authority cited by Mr. Anderson of Bankton is really exceedingly vague, and appears to throw very little light upon the subject. He says, in Book I., Title 5, Section 132, she may be divorced "upon account of the husband's cruelty or maltreat-"ment." Now it depends upon what is meant by "cruelty or "maltreatment" whether this passage applies to the case at all or not. The expression may be confined in the writer's eye to physical maltreatment, injuries to the person or threats of such injuries, in which case the authority would have no bearing whatever upon the present case.

Then Mr. Erskine is cited. He says, "As it is the wife's "duty to live in family with her husband, he cannot be compelled "to maintain her in a separate house; yet if he should either "abandon his family or turn his wife out of doors, or by bar-"barous treatment endanger her life, or even offer such indig-"nities to her person as must render her condition quite uncom-"fortable, the Judge will, on proper proof, authorize a separation "*a mensa et thoro*." This proves very little; for "indignities "to her person" may mean such indignities as we call here per-sonal violence, or threats of immediate violence. If, on the

other hand, are meant only indignities of language, or of not associating with her, or of leaving her in a room by herself and not speaking to her; indignities which render her life uncomfortable, then I can only say that this is not the law laid down in any of the cases, save perhaps one, that of the Duke and Duchess of Gordon, and which I take to be clearly unsustainable as law in Scotland.

Then comes the authority of a very able text-writer, Mr. Bell, who, in his *Principles*, has said that judicial separation may take place if life is endangered, or on "fair and "reasonable ground of apprehension of personal violence," or from "continued annoyance wearing out and exhausting the "party." Now that is abundantly vague. Clearly no continued annoyance, without threats, and without making it utterly impossible for the woman to live with and endure the society of her husband, no annoyance of an ordinary kind, however continued, can, even by the authorities of the law of Scotland, be maintained as a sufficient ground for divorce.

Next, we have Mr. Bell's *Illustrations*, in which he refers to one or two cases, and among others, to that of Colquhoun *v.* Colquhoun, in which the Court actually found that the husband had a right to make the wife quit his house and repair to another which he had prepared for her reception—a thing to be very much kept in view here, where we find that this case has been mainly decided on the grounds that the husband did not frequent his wife's society, but made her live in a different part of the same house.

We are now to consider the cases; and that of the Duke of Gordon in the first place. Can any man pretend that it is the law of Scotland at this day (certainly the Judges themselves do not so state it,) that the following is a sufficient ground of separation, *a mensa et thoro?* Refusing to allow the wife money for her necessary uses, as mourning at the Queen's death; debarring her from superintending the education of her

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children, especially her daughters, when young; shutting the doors of his lodgings, and keeping her out at night, and thrusting away the coachman for opening the same. Clearly all these form no ground of separation; no one can contend it; and the learned Judges did not contend it. Therefore the case of the Duke and Duchess of Gordon, if it proves anything, proves a great deal too much; and I take upon me to say, if the decision went upon the ground stated, it is not now law. To be sure, there follows in the Report a very material addition to the facts—an addition upon which the case must have proceeded, and without which it never could have been rightly pronounced. I mean the interlocutor overruling the judgment of the Commissaries, and directing the cause to go on. "His scandalous "and familiar converse," it is stated, "with one Mrs. Needham, "her waiting-woman, and protecting her after the Duchess had "discharged her the house." "Scandalous and familiar con- "verse" can only mean one thing—can only mean illegal connection with that woman. I have no manner of doubt that the Court thought so, and that the case turned upon this material circumstance.

There are one or two other cases relied upon, Letham *v.* Letham is on "maltreatment and adultery." Now, what does the Lord Ordinary say as reported there? "That during the "dependence of the action of aliment brought by the Respondent, "the Representer raised a counter-action of adherence, and that "those actions upon his own motion were conjoined, and there- "fore finds it unnecessary to determine whether the action of "aliment was competent. Finds that a maid-servant with "whom the Representer had had a criminal intercourse, was "allowed to continue in family with him at the time of his "marriage, and that, after the Respondent, on knowing the fact, "had justifiably withdrawn from his society, the same person "was retained in his family, or was brought back to it, and finds "that this gross dereliction of his duties as a husband entitled

"the Respondent to withdraw finally from his society." I take it to be clear, then, that the Court proceeded upon the belief that the adultery before the marriage inured afterwards; that it was continued by his keeping the adulteress, the servant, in the house with his wife.

As for the case of Shand *v.* Shand, which is the only other having any bearing upon the present, I find that the point there decided is foreign to the present question. Indeed, the case was not stated by Mr. Turner in any other way than because of the *dictum*. A case of constant maltreatment is said to have been alleged upon the Record; but let it be observed, that we are left wholly without any detail, any specification of the particulars of which that constant maltreatment was stated to consist. Accordingly, the case seems to be adduced only for the *dictum* of the Lord Justice Clerk, who says, "I never dreamt that we "were now to go into all this mass of correspondence—we are "not in a concluded cause—no proof has yet been allowed, and "in the meantime I shall reserve my opinion upon the merits "and bearings of the evidence, into which I will not enter at "present. But I never can accede to the proposition that the "only legal ground of matrimonial separation must rest on "personal violence. That is not the law of the country, and I "will venture to say it is not the law of any civilized land. A "train of maltreatment may occur in the married state to be "viewed and weighed according to the *status* of the parties in "society." And he then says that she is not "to be precluded" "from her entire proof when the treatment becomes unbearable." This case, therefore, really proves nothing except the opinion of the learned Judge, that the law of Scotland does not require, and I do not say that it requires, proof of actual personal violence, or even threats of immediate infliction.

But then, my Lords, the question is, whether the facts before us bear us out in saying that the case at bar comes up to the cases put by the learned Judges, and upon which their opinion

seems entirely to have turned? When Lord Jeffery puts the case, which he imagines, for the purpose of showing that not merely violence, but things far short of violence, will justify the Court in pronouncing a separation, such as the holding her up to scorn before her own servants, ordering her servants, not only to disobey her, but to join in the chorus of hissing against their mistress, his wife, the mother of his children, at the head of his family—when Lord Jeffery puts that as a case, I have only to answer it by saying that it is a very good case to support a proposition which I do not deny, viz., that it is not necessary there should be personal violence to constitute a ground for divorce. But it is anything rather than a confirmation of the judgment here pronounced, because it is enough to say that case is not this case. Not only that case is not this case, but this case has nothing like that case. What have we here? Withdrawing from her society, coldness towards her, leaving her apartment, telling her father that he will on no account ever renew his cohabitation with her, stating that he is wretched in consequence of his marriage, all things very painful to the feelings of the woman,—all things very unhappy for the man, but anything rather than those things which Lord Jeffery supposes in the case put, and which case put, and others of a like kind, appear to have been working more or less in the minds of the learned Judges during all the time that they were applying their minds to the consideration of the facts of the case before them, and to have seduced, as it were, their attention from that which ought alone to have occupied it, the facts proved in evidence before the Court. I remember among other things in that evidence a statement that he walked out very much with his sister, that he frequently was seen in her company—never with his wife; that the gardener observed the sister and the brother together, and when they saw the wife coming in sight they would turn round so as to avoid a meeting. Painful to the wife, no doubt, all this; painful that he should prefer his sister's society to his wife's, but anything

rather than such cruelty as would justify a sentence of divorce. As for the lesser matter of his not going to church with her; his even not allowing her to attend Divine service; his preventing her family from associating with her, and his giving a threat to the father that if they came they should understand that it must be at their own peril, of course all this might be very improper in his circumstances, considering the relations of the parties, but it is anything rather than the cruelty required to support an application for divorce. With regard to the treatment of her before the servants, he says distinctly, and it is not traversed on the Record, it is not even denied at the bar, that during all the time he remained alienated from her and suffering from his own depression of mind, he never used a single spiteful, or violent, or scornful expression towards her. That is not denied. Nay, it is asserted, and no such expressions are proved. Nor is there anything of the kind in his correspondence with the father observing upon the state of his feelings, and endeavouring, I think unsuccessfully, to excuse his own previous conduct. It may be further observed, and especially with reference to the cases put below of a husband calling on his servants to join in showing disrespect to their mistress, that the evidence here is the very reverse. It is proved that the servants took their orders from her, habitually treating her as mistress of the house, always with her husband's knowledge and assent, and sometimes by his express directions.

Then, my Lords, this judgment being of a nature that the law neither of the one part of the island nor of the other can support, what remains for us to do but to reverse, and to take care that in the reversal we do not set up the first interlocutor of the Lord Ordinary, which appears erroneously to lay down that nothing but actual personal violence will suffice as a ground of divorce. I should be sorry that such a view of the law of Scotland should go forth as implied the propriety of dismissing the action "in respect the libel is laid upon a series "of insults and indignities said to have been offered by the

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"Defender to the Pursuer, unaccompanied with personal violence, "or any menace thereof, and that, without an allegation to that "effect, it appears to be settled on authorities which the Lord "Ordinary is not entitled to question, that a libel, at the instance "of a wife against a husband, founded on such averments as "those now urged, is not relevant." That, my Lords, is not the law of Scotland; it is not the law of England; it is an inaccurate statement of the law in both countries. I will not say that the law of Scotland, as far as decided cases go, may not extend somewhat further than our law in favour of the remedy. Therefore, I shall propose to your Lordships this course—to reverse the interlocutor appealed against of the 13th of January, 1846, in so far as it remits the case to the Lord Ordinary with instructions to open the Record, and proceed in the cause; but to affirm that interlocutor in so far as it alters the interlocutor of the Lord Ordinary with respect to the grounds of his dismissing the action. It will, therefore, stand thus—that you, giving the same judgment as the Court below ought to have given, alter the interlocutor of the Lord Ordinary in respect of the restricted view which he takes of the grounds of a sentence of divorce, but affirm the interlocutor of the Lord Ordinary in so far as, independently of those reasons, it dismisses the suit. Then, in respect of the ultimate decision of the Court below, the second interlocutor appealed from of the 24th of January, 1849, which grants a "remit to the auditor to tax "the account of expenses and to report, and before answer as "to the question of aliment, ordains the Defender within "fourteen days to give in a special condescendence of the "amount of his means and estate," that must be reversed altogether.

In thus moving your Lordships, I must add, that I sincerely lament the unfortunate fate of this lady, to be wedded to such a prospect. I view, with a disposition charitably to extenuate, if I could justly, the conduct of Mr. Paterson. He appears to have

been led on from one thing to another, without due reflection upon the necessary consequences of what he was doing. From his pecuniary views, coupled with the attachment which he seems for a moment to have formed for Miss Russell, he appears to have been drawn into a course of proceeding which is wholly indefensible, of which he must in part pay the penalty, but from which the wife, the more innocent party, must be still more a sufferer.

With these observations, I move your Lordships to reverse the one interlocutor altogether, and to alter the other interlocutor in the way which I have stated.

Mr. Turner.—Before your Lordship proceeds to put the judgment of the house, you will be aware that the case is a peculiar one with reference to costs. Your Lordship observes the nature of the suit.

Lord Brougham.—We cannot give her the costs when she sues her husband and fails.

Mr. Turner.—Ordinarily speaking, the husband pays all the costs in suits of this description.

Lord Brougham.—In Doctors' Commons, when the husband sues, he pays all the costs even of an appeal to the Arches.

Mr. Turner.—So it is in Scotland.

Lord Brougham.—But does the wife ever in this country receive her costs when *she* applies for a separation from her husband, and fails?

Mr. Turner.—I apprehend so, my Lord.

Lord Brougham.—Dr. Harding, when the wife fails in an attempt to obtain a separation *a mensa et thoro*, do you ever allow her costs from the husband who succeeds?

Dr. Harding.—I do not remember any such case, my Lord, on application to the Court at all. I do not remember a case of any such application being made; and for this reason, if your Lordship would permit me.—In Doctors' Commons, the wife takes care to get her costs out of the husband, *de die in diem.*

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Lord Brougham.—Do you mean when she sues him?

Dr. Harding.—When she sues him for a divorce, she may do it.

Lord Brougham.—When she sues for a divorce, does she get her costs, supposing she fails?

Dr. Harding.—She does not make an application after having failed, that I ever remember, my Lord.

Lord Brougham.—But does she before failing? If she succeeds, of course she will get costs; but suppose it remains *in dubio* whether she may succeed or not, does she then get her costs *de die in diem?*

Dr. Harding.—Yes, my Lord, I believe she does if she chooses, on the ground that she has nothing of her own—that she has not wherewith to sue.

Mr. Turner.—It is more strongly, my Lord, the rule in Scotland.

Lord Brougham.—They have given the costs below.

Mr. Turner.—Yes, my Lord, but if your Lordship reverses the interlocutor, we shall not recover those costs.

Lord Brougham.—It must be reversed with the exception of the part of it, which awards her her costs.—She will, of course, have no costs here.

Mr. Turner.—Probably your Lordship will reserve the costs of the appeal.—We have come here supporting the judgment of the Court below.

Lord Brougham.—Yes, but you never get costs at all when you fail—the Respondent never gets the costs of the appeal when he fails.

Mr. Turner.—No, My Lord, excepting from the peculiar nature of the suit.

Lord Brougham.—All we have now to do, is to reverse the interlocutor complained of, with the exception of the portion of it which allows costs to the wife.

Mr. Turner.—I should apprehend that your Lordship would

look at it with reference to what the case would be in the Privy Council. Supposing the wife had succeeded in the Court below, and there had been an appeal to the Privy Council or to the Delegates, the course of the case there would have been——

Lord Brougham.—There is a peculiarity in that jurisdiction. We there give costs to the party who succeeds in reversing—that we never do in this House, our rule is a perfectly peremptory one.

Mr. Turner.—I am quite aware of that, my Lord. This is almost the first case of this description that has ever come up to this House. I am not aware of any other which has come up to this House.

Lord Brougham.—We will look into it. But in Doctors' Commons and at the Delegates, and that which is substituted for the Delegates, the Judicial Committee, we constantly, both in Indian Cases, and also in Consistorial Cases, direct the costs of the Appellant to be paid by the Respondent when the Appellant succeeds, but here no such thing is ever done.

Mr. Turner.—Your Lordship observes that this is the first case.

Lord Brougham.—Nor is it done in the Court of Chancery.

Mr. Turner.—No, my Lord, I quite agree, but the principle which governs the case is this, that the wife has nothing to sue with, and therefore the Court awards her the costs.

Lord Brougham.—Yes; but you may just as well say that if the wife indulges in any other luxury than law, if she goes into a shop and buys that which is beyond her degree, the husband has a duty imposed upon him to pay.

Mr. Turner.—Your Lordship observes that the luxury of your Lordship's judgment against her is not her seeking.

Dr. Harding.—Your Lordships have decided that she had no grounds at all for originally suing; we ought not to be made to pay the costs of that.

Lord Brougham.—We decide that she had no grounds. One

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thing I ought to have taken notice of, that her conduct or that of those who have advised her, is highly reprehensible. I never saw a more scandalous matter introduced upon a Record than those charges, those foul charges, wholly unsupported, wholly unproved, nay, I may say, negatived, the charges against this gentleman and his sister. That is a feature in the case which it is exceedingly painful to contemplate, and a consideration of it will govern my discretion as to giving costs if any we have.

Mr. Turner.—On the other side, your Lordship must take into your consideration the conduct of the husband, and the general rule which gives the wife the costs. The first interlocutor appealed from, my Lord, gives the same direction upon costs.

Lord Brougham.—Are there costs upon the first interlocutor?

Mr. Turner.—Yes, my Lord.

Lord Brougham.—Then we must make the same exception. But we allow the first interlocutor appealed from to stand, except so far as I have stated.

Dr. Harding.—That interlocutor protects itself.

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LORD BROUGHAM.—After hearing and considering this case there was a reversal of the interlocutor of the Court below, but as there is no instance of the costs of the appeal being given in a case of this kind, I do not see how it is possible to do so here.—We do it in the Judicial Committee of the Privy Council, but we do it because it used to be done in the Court of Delegates, and the Judicial Committee has come in the place of the Court of Delegates; and we also do it in Indian Cases which fall within the scope of a like rule, but we never give the costs in an appeal from any Colonial Court. It is no doubt a very hard case.

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It is Ordered and Adjudged, that the said interlocutor of the 13th of January, 1846, complained of in the said appeal be, and the same is hereby affirmed, but only so far as it recals so much of the therein-mentioned interlocutor of the Lord Ordinary, of June 25th, 1845, as states the grounds of dismissing the action, and so far as it decerns against the Defender for the sum of 25*l.* to be paid to the Pursuer towards defraying her expenses, and for the dues of extract, and allows interim extract to go out accordingly, and that, *quoad ultra*, the said interlocutor of the 13th January 1846, be, and the same is hereby reversed; and that the said interlocutor of the Lord Ordinary, of the 25th of June, 1845, dismissing the action, be, and the same is hereby affirmed, except so far as it states the grounds of such dismissal; and that the said interlocutor of the 24th of January, 1849, also complained of in the said appeal, be, and the same is hereby affirmed, so far only as it finds the Pursuer entitled to the expenses as therein mentioned, and appoints an account of expenses to be lodged, and remits to the auditor to tax the same, and to report, and that, *quoad ultra*, the said interlocutor of the 24th of January, 1849, be, and the same is hereby reversed: And it is further Ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

ALEXANDER DOBIE—LAW, HOLMES, ANTON, and TURNBULL.

[HEARD 1*st March*, 1849.—JUDGMENT 9*th August*, 1850.]

ARCHIBALD BONAR, Esq., Manager, and for behoof of the EDINBURGH AND LEITH BANK, *Appellant.*

COLONEL WILLIAM MCDONALD, of Powderhall, and others, *Respondents.*

Cautioner.—A cautioner, for the discharge of an office by an agent, is freed from his liability, if the principal alter the responsibilities of the agent; although the loss, in respect of which the cautioner is sought to be charged, may not have arisen directly out of the alteration.

EARLY in the year 1839, David Bird was appointed Teller in the Edinburgh and Leith Bank, and on 16th January, 1839, gave a bond of caution for the fulfilment of the duties of his office, by himself, as principal, and by the Respondents, William McDonald, Archibald Torrance, and William Ballantyne, whereby Bird, as principal, and the other parties, "as cautioners, sureties, and full debtors for and with the said David Bird, bind and oblige ourselves, conjunctly and severally, and our respective heirs, executors, and successors whomsoever, without the benefit of discussion, that, so long as I, the said David Bird, shall continue to hold the aforesaid office of Teller of the said Edinburgh and Leith Bank, in consequence of the said election, or by annual re-election or otherwise, I shall have no other business of any kind, nor be connected in any shape with any trade, manufacture, or mercantile co-partnery, nor be agent for any individual or co-partnery, nor be security for any individual or co-partnery in any manner of way whatsoever, and that I shall carefully

" and diligently attend to the business of the said Edinburgh " and Leith Bank, and faithfully discharge the duties of Teller " foresaid to the best of my skill and ability, and shall well, " fully, and truly account to the manager or to the directors " of the said Edinburgh and Leith Bank for the time, for " behoof of said bank, for all sums of money, whether in specie " or bank notes, bills, discounts, debentures, or other securities " with which I shall be intrusted from time to time, or which " shall come in any way into my hands in the execution of the " trust committed to me, and shall pay and deliver to the said " manager or directors for the time, all sums of money belong- " ing to the said bank in my custody whenever required so to " do; and whatever loss, damage, skaith, or expense the said " bank shall happen to sustain or incur by or through me, " the said David Bird, Teller foresaid, I, the said David Bird, " as principal, and we, the said William McDonald, William " Ballantyne, and Archibald Torrance, as cautioners, sureties, " and full debtors for and with the said David Bird, under the " declaration after mentioned, do hereby bind and oblige our- " selves, conjunctly and severally, and our respective foresaids, " to make good, refund, content, and pay to the said Edinburgh " and Leith Bank, or to the manager thereof for the time, or to " the directors thereof at Edinburgh for the time, for the use of " the said bank, and that immediately upon their sustaining " or incurring the said loss, damage, skaith, or expense, with " a fifth part more of penalty over and above the payment, " and the legal interest of all such loss, damage, skaith, or " expense, from the time the same shall be incurred till pay- " ment thereof; declaring always, as it is hereby specially " provided and declared, that we, the said cautioners, are and " shall only be liable by virtue of this present bond of cau- " tionary in the sum of one thousand pounds sterling, to " which our security is restricted, and to be no further " extended."

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Not many months after the execution of this bond, the bank resolved to appoint Bird their agent for the management of a branch establishment at the town of Dalkeith: and in terms of an arrangement to that effect, he and his cautioners, on 11th and 18th April, and 2nd May, 1839, became parties to a docquet on the back of the bond to this effect. "We, David Bird, William McDonald, William "Ballantyne, and Archibald Torrance, all within designed, "considering that, since the execution of the within-written "bond, the said David Bird had been appointed agent at "Dalkeith for the within-mentioned Edinburgh and Leith "Bank, on condition of our continuing our cautionary obli- "gation for him, to the extent, and in the manner within- "specified, we do hereby consent to the said alteration in "the situation held by the said David Bird, and declare "that, so long as he shall continue agent as foresaid, the whole "obligations and stipulations of the within bond shall be "applicable to, and have full force, strength, and effect, "and be equally binding on us and ours within-written, for, "in respect of the said David Bird, as agent foresaid, and "that in the same manner as if the whole obligations within- "written were here repeated, any law or practice to the contrary "notwithstanding."

Subsequently, on the 3rd April, 1840, an alteration was made in the terms of Bird's appointment, whereby his salary was raised, and the liability was imposed upon him of one-fourth of the losses from discounts to customers—and the following letter upon the subject was addressed to him by Kerr, the accountant for the bank, on the 14th May, 1840: "In consequence of the alteration in the terms on which you "hold your appointment, you now being liable for a certain "part of the loss arising from discounts, it will be necessary "that you execute a new bond. I have not intimated it to "your cautioners, as it will be better for you to do so

"yourself; but I will be glad that you take an early oppor-
"tunity of advising me whether I shall re-extend your bond
"by the same parties."

Bird, on the 15th May, wrote the Appellant, "I have this
"morning received Mr. Kerr's letter regarding the alteration
"of the terms on which I hold my appointment, being liable
"for a certain loss arising from discounts, and that I will
"require to get executed a new bond, holding the sureties
"liable for any loss that may be sustained, I beg to say in
"answer, that I really think the directors are pressing the
"thing too hard; and if I was asked by any person to become
"their security on the same terms, I certainly would decline;
"and, on the same principle, I regret to say that I could not
"go forward to ask my present securities on these terms; but
"as far as I am personally concerned, I shall have no objec-
"tions to sign any letter of guarantee or bond you may wish
"to that effect, by way of holding me liable for a fourth of
"the loss, and would thank you to impress upon the directors
"the unpleasant step they are wishing to enforce upon me. I
"believe none of the agents here are liable for any loss, and
"hold a great deal higher salaries; and I can assure you, if
"the directors establish this system, they will injure their
"branch business very much."

On the 22nd of May, 1840, the manager read this letter to the Directors of the Appellants' Company, and their minute, after giving the import of the letter, concluded thus,—"with "which the Board declared themselves satisfied."

In the year 1844 the Appellants brought an action against the Respondents, the cautioners in the bond granted by Bird, the summons in which set forth that, in the month of November, 1840, Bird communicated to the Appellants a proposal by Moffat to open a cash account with Bird's agency at Dalkeith, giving Carter and Paterson as his securities; that while this offer was under consideration, Bird wrote the

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Appellants that Moffat further offered Williams as his security. That, upon this additional offer, Moffat's proposal was accepted, and a bond for a cash credit of 1,500*l.* was prepared, and sent to Bird, to be executed by Moffat, Carter, Paterson, and Williams. That the bond was executed by Moffat, Carter, and Paterson in the month of February, 1841. That Williams delayed executing the bond, and finally, in March, 1841, wrote Moffat that he would not execute it, and this letter Moffat delivered to Bird at the time. That, after the bond had been executed by Moffat and Carter alone, Bird allowed Moffat to overdraw upon a previous deposit account to the extent of 1,249*l.* 13*s.* 6*d.*, and transferred this sum of 1,249*l.* 13*s.* 6*d.*, from the debit of the deposit account, to that of the cash account, and further allowed Moffat, before the bond had been executed by Paterson, to make further drafts whereby the sum he owed the Appellants was increased to 1,496*l.* 4*s.* 4*d.* That after the bond was executed by Paterson, Bird allowed Moffat to continue operations on the cash account, until his bankruptcy and the sequestration of his estates, in March, 1841, at which time, the debt due by Moffat to the Appellants had been increased to 2,005*l.* 11*s.* 2*d.* That during all this time, Bird retained the bond by Moffat and his cautioners in his possession, and never communicated to the Appellants that Williams had refused to execute, and never had executed it, and that this did not become known to the Appellants, until the occurrence of Moffat's sequestration. That the Appellants, after intimation to the Respondents and reservation of their recourse against them, gave Paterson a charge upon the bond by Moffat and him, for payment of the 1,500*l.* covered by it, but that the Court suspended the charge, holding that Paterson was not liable in respect of the irregularities which had been committed by Bird in omitting to procure the signature of Williams, and making advances to Moffat before the bond had been executed by Paterson.—The summons, therefore, concluded against Bird for payment of the debt owing by Moffat, and

against the Respondents to the extent of the 1000*l.* covered by their bond for Bird.

The Respondents pleaded in defence *inter alia*:

"I. The bond and subsequent relative obligation to which "the Defenders were parties do not support the present action, "in respect these deeds were not intended or framed so as to "cover the liability now sought to be brought within them.

"II. The Defenders are free from their cautionary obliga- "tion, in respect that the bank, without the consent or know- "ledge of the Defenders as his cautioners, altered the contract "between them and the agent, so as to increase the liability of "the latter.

"III. The bank is barred from founding on the alleged "misconduct of Bird in making the over advances to Moffat "under both accounts, in respect the same were known, sanc- "tioned, and acquiesced in by the bank, or at least ought to have "been discovered by the bank."

The Lord Ordinary (*Wood*), after ordering cases by the parties, made avizandum with them to the Inner House, which, on the 16th of July, 1847, pronounced the following interlocutor: "Sustain the defence set forth in the second plea in "law for the Defenders, the cautioners of David Bird; assoilzie "the said Defenders from the whole conclusions of the action, "and decern."

Mr. Turner and *Mr. Anderson* for the Appellants.—I. The supplementary obligation endorsed upon the bond of caution does not contain any condition as to the mode in which the Appellants were to deal with Bird. There is no provision that he is not to discount bills or undertake any responsibility on that account; and the stipulation in the original bond that Bird should not have any other business nor be connected in any way with trade or manufacture was a stipulation in favour of the Appellants and not of Bird or his cautioners. So far, therefore,

the case is clear. It was not necessary to consult the cautioners, for the original obligation contained no provision as to the mode of dealing between the bank and their agent; and the increase of responsibility thrown on Bird might reasonably have been in the contemplation of all parties from the first.

II. Bird having, in violation of his duty, made over advances out of the funds of the bank, his cautioners are bound to make good the deficiency to the extent of their bond.

III. The enlargement of Bird's responsibilities did not increase the chance of his malversation or neglect of duty, for which alone the sureties were to be answerable.

Mr. Bethell and *Mr. Charles Baillie* for the Respondents.—The bond and subsequent obligation did not cover the advances in question. But at any rate, the cautionary obligation is discharged by the alteration of the original agreement and the enlargement of the original liability without notice to the Respondents. The rule in England is, that any variation in the agreement, made behind the back of the surety, will liberate him. Evans *v.* White, 5 *Bing.* 485, 1 *Mood. & Malk.* 468; Eyre *v.* Bartropp, 3 *Madd.* 221; Archer *v.* Hale, 4 *Bing.* 464; Whitcher *v.* Hall, 5 *Barn. & Cress.*, 269, 8 *Dowl. & Ryl.* 22. The law of Scotland is the same, Railton *v.* Matthews, 1 *Bell's App. Cases*, 359; Hamilton *v.* Watson, 4 *Bell's App. Cases*, 67; Bell's Principles, *Prop.* 259; and Bell's Commentaries, *Vol. I. p.* 359.

Moreover, in the present case, the Appellants were deficient in the necessary care which was incumbent on them to prevent the negligence or dereliction of Bird in his office.

Mr. Turner replied.

BONAR *v.* MCDONALD.—9th August, 1850.

9th August, 1850.

LORD BROUGHAM.—My Lords, this case was heard last year by the late Lord Chancellor *(Lord Cottenham)* and myself. Three parties became what are called in Scotland cautioners, for the faithful discharge of the duties of his office by a bank agent, who was moreover bound in a bond "to have no other "business of any kind, nor be connected in any shape with any "trade, manufacture, or mercantile copartnery, nor be agent "for any individual or copartnery, nor be security for any indi- "vidual or copartnery in any manner or way whatsoever." Those were the terms of the cautionary obligation.

The bank thereafter entered into an agreement with the agent, whereby he became liable for one-fourth of the losses arising from discounts, and his salary was in consequence increased, but the cautioners were not informed of this agreement. The Court below held, that in respect of the innovation made by the bank on his position, the cautioners were not liable in loss caused by the misconduct of the agent, and this notwithstanding that the loss sought to be recovered did not arise in consequence of any transaction under the new agreement.

Now, my Lord Cottenham, with whom I entirely agree, has sent me this note of his opinion upon the subject, which I will read to your Lordships as part of my statement; but it is from my noble and learned friend, who is now absent:—

"The Court of Session decided this case in favour of the "Defenders, upon the grounds raised by the second plea in "law, 'that the bank, without the consent or knowledge "'of the Defenders, the cautioners, altered the contract be- "'tween them and the agent, so as to increase the liability of "'the latter.' *Supra, p.* 384. Concurring as I do with their "'opinion, it is unnecessary for me to observe upon the other

" grounds discussed by the Lord Ordinary. By the bond en-
" tered into by Bird the agent, and the respondents his cau-
" tioners, with the Edinburgh and Leith Bank, for the due
" performance by Bird of the duties of the office of teller of the
" bank, it was stipulated that he should have no other business
" of any kind, nor be connected in any shape with any trade,
" manufacture, or mercantile copartnery, nor be agent for any
" individual or copartnery, nor be security for any individual or
" copartnery in any manner or way whatsoever.

" Upon Bird's appointment by the bank to be their agent
" for the branch at Dalkeith, a supplementary obligation was
" entered into, by which the cautioners conceded that their for-
" mer obligation and all its provisions should be applicable to
" Bird's agency at Dalkeith. Whatever may be the usual duties
" and liabilities of an agent of a branch bank as to the discount
" of bills, it is clear, that as between Bird and his principals it
" was not considered that he was to have anything to do with
" the business as agent of the Dalkeith branch, so as to impose
" any liability upon him, because a new arrangement was after-
" wards entered into between him and his principals, by which
" it was agreed that his salary should be raised to 130*l.* per
" annum, he being responsible for one-fourth of the losses sus-
" tained by his discounts. This alteration in the contract be-
" tween the principals and the agent, is the ground relied upon
" by the second plea in law, and upon which the judgment is
" founded; and so sensible were the bank that this affected the
" liability of the cautioners, that we find their agent writing to
" Bird thus:—' In consequence of the alteration of the terms
" ' upon which you hold your appointment, you now being liable
" ' for a certain part of the loss arising from discounts, it will
" ' be necessary that you execute a new bond. I have not in-
" ' timated it to your cautioners, as it will be better for you to
" ' do so yourself; but I will be glad that you take an early

" 'opportunity of advising me whether I shall re-extend your " 'bond by the same parties.' Bird objected to apply to his " cautioners, and nothing more was done, they remaining in " ignorance of, and certainly not being parties to, this altera- " tion in the contract between Bird and his employers. The " loss sought to be recovered against the respondents as cau- " tioners does not appear to have arisen from the discounting " business, but to consist of a balance due from a customer of the " branch bank, who was permitted to overdraw his account to " an unusual and unreasonable extent without security; but if " the arrangement as to the discounts altered the subsisting " contract between the bank and their agent, so as to increase " the liability of the latter, his securities may be discharged for " all purposes. Such is the law of this country, and the law of " Scotland is the same. The rule, as extracted from the Eng- " lish authorities,—Evans *v.* White, Eyre *v.* Bartrop, Archer " *v.* Hale, and Whitcher *v.* Hall,—is, that any variation in the " agreement to which the surety has subscribed, which is made " without the surety's knowledge or consent, which may preju- " dice him, or which may amount to a substitution of a new " agreement for a former agreement, and though the original " agreement may, notwithstanding such variation, be substan- " tially performed, will discharge the surety. And as to Scot- " land, in Bell's Principles the rule is laid down that the cau- " tioner is freed 'by any essential change consented to by the " 'creditor on the principal obligation or transaction without " 'the knowledge or assent of the cautioner.' And this doctrine " is supported by the authorities referred to.

" The only question, therefore, is, was the arrangement as " to discounts an essential change in the principal obligation? " This the parties have themselves decided; for in stipulating " that Bird should remain free from any engagement or surety- " ship for any other person, they admitted that his doing so

" would be injurious to the other parties to the contract; and " it would not be less so because the engagement and surety- " ship was for the benefit of the bank, being, as it was, to the " prejudice of the cautioners. This stipulation precludes the " pursuers from contending with success, that the arrangement " as to discounts was immaterial to those interested in the " suretyship, or was collateral to, and independent of it; and " these are the only grounds upon which they rely.

" I am for these reasons of opinion, that the interlocutors " appealed from were right, and that the appeal ought to be " dismissed, with costs."

My Lords, agreeing entirely with the view of my noble and learned friend, I move your Lordships that the interlocutors appealed from be affirmed, with costs.

Interlocutors affirmed accordingly, with costs.

J. DODDS—A. DOBIE, Agents.

[HEARD 1*st*, 5*th*, *and* 6*th March*, 1849—JUDGMENT 14*th August*, 1850.]

THOMAS DYKES, *Appellant.*

ROBERT STRUTHERS, *Respondent.*

Liability of a Cautioner or Surety.—Where, by reason of the blunder of a sheriff's officer in executing diligence, his employer is involved in litigation and fixed with damages, he may claim relief from the officer's surety; and it will not avail the surety to show that he had neither intimation nor knowledge of the proceedings.

The employer of the officer, when sued for damages by the party injured, may reasonably defend the officer's execution; and for the expense of a reasonable defence he will be entitled to claim compensation from the surety.

The surety, in so far as he can show that the defence was not reasonable, will be free from liability.

Practice.—Although the Lords may doubt the soundness of an order made by the Court below, they will not interfere to correct it, unless asked to do so by the appeal.

DYKES was surety by bond for Baird, a sheriff's officer, "that he, Baird, would leally, truly, and honestly use and exercise the office of a sheriff's officer to all and sundry who might "employ him;" and for any damage that might be sustained through the negligence, fraud, or informal executions of the said Baird in his said office, Dykes was by the bond bound to make reparation.

Baird was employed by the Respondent Struthers to execute a process of poinding against one M'Closkie, and in doing so committed a gross blunder, in consequence of which M'Closkie brought an action of reduction, improbation, and damages against Struthers and against Baird.

DYKES *v.* STRUTHERS.—14th August, 1850.

Both Defenders resisted the action, and maintained that the execution was formal and regular; or, at all events, was not subject to any material defect.

During the progress of the litigation (which was very long and expensive, considering the insignificance of the point at issue), one of the two Defenders, the Sheriff's officer, Baird, departed this life; and the persons entitled to represent him, having renounced his succession, were in December, 1838, by a decree *cognitionis causa tantum*, assoilzied from the conclusions of the libel.

The action was then carried on against Struthers as sole Defender; who omitted to give any intimation of the proceedings to the surety, Mr Dykes.

On the 9th January, 1840, an issue was sent for trial, which terminated in a verdict for Struthers. This verdict, however, in February, 1840, was set aside, and a new trial granted.

On the 11th July, 1840, a formal intimation by notarial instrument was given by Struthers to the surety Dykes, apprising him of the proceedings, and calling upon him to compensate and make good to Struthers all damage arising from the deceased officer's blunder, and all the expense of the consequent litigation. To this intimation Dykes replied that he had "no recollection" of being surety for the officer, and that, as he had not been made aware of the proceedings, the result of them could not affect him.

The issue between M'Closkie and Struthers was tried again on the 23d March, 1841, when a verdict was returned for M'Closkie, with one shilling damages; and on the 12th June, 1841, a judgment was pronounced applying this verdict, and finding Struthers liable to M'Closkie in costs.

Upon this, Struthers brought an action against Dykes on the ground that he was surety for Baird, and on the ground that Baird, having blundered the execution, whereby loss and

heavy expense had come upon Struthers. Dykes was consequently bound to make adequate reparation.

Dykes put in a defence, stating that as he had never received notice of the proceedings between M'Closkie and Struthers, and as he was in point of fact ignorant of them till the notarial intimation, it was contrary to justice to charge him with the expense of a litigation which, had he been apprised of it in proper time, he would have stopped at the outset.

He further contended that Struthers and Baird ought not to have resisted the action of M'Closkie, for that the blunder committed in executing the process was gross and indefensible.

The question came to be mainly whether Struthers was, or was not, bound by law to give notice of the proceedings to the surety; and whether the want of notice, and the want of knowledge, on the part of the surety, relieved him from a responsibility to which he would otherwise have been subject.

The Lord Ordinary Robertson, by an interlocutor bearing date the 12th February, 1847, found "That the litigation car-
" ried on by Struthers in support of the execution, after the
" officer had died unrepresented, was *reckless*." He also found that Struthers "was bound to have made the surety aware of
" the existence of the proceedings; and that, having made no
" such intimation, he was not entitled to reimbursement of ex-
" penses so recklessly incurred. But, inasmuch as the execu-
" tion of the process was rendered nugatory by the blunder of
" the officer, for whom the surety was responsible, and inas-
" much as it was to be presumed that the original debt might
" have been recovered by virtue of the process, if that process
" had been regularly executed,—he decerned against the surety
" for 20*l*., being the amount of the original debt and interest;
" and with respect to the expenses incurred prior to the death
" of the officer, and until the decree of the 7th December, 1838,

" he found that Struthers might have been in *bonâ fide* to incur " these expenses; and, therefore, he found the surety liable in " that portion of the accounts claimed, under certain deductions. " But finally, and generally with respect to the whole of the " subsequent expenses, he assoilzied the surety."

In explanation of this judgment, the Lord Ordinary issued a note, stating that although the surety " was bound for all the " ordinary consequences of the officer's blunder," and although the mere want of intimation to the surety was not sufficient to liberate him; yet, that there were specialties in the case which gave the surety a claim to have the expenses charged against him modified to the extent defined by his interlocutor.

There were reclaiming notes on both sides appealing from this interlocutor of the Lord Ordinary, to the Second Division of the Court of Session; and on the 24th June, 1847, that tribunal pronounced judgment agreeing with the Lord Ordinary in so far as he had held the surety liable for the original debt and interest, but disagreeing with his modification of the subsequent expenses; as to which, the Second Division (being of opinion that the defence to M'Closkie's action was not " reckless," but proper and reasonable), pronounced a final judgment against the surety, charging him with the costs of the entire proceedings, excepting those of the first trial.

Against this judgment of the Second Division, and against the interlocutors of the Lord Ordinary, in so far as hostile to the surety, he tendered to the House of Lords the present appeal.

Mr. Bethell and *Mr. Stuart Wortley* for the Appellant.—I. By the law of Scotland intimation is necessary to fix the surety with liability. This was decided in M'Pherson *v.* Campbell, 19th May, 1825, IV. *Shaw*, 21; Fraser *v.* Andrew, 28th January, 1831, IX. *Shaw*, 345; Collier *v.* Wilson, 6th Decem-

ber, 1836, XV. *Shaw*, 196; and in Clason v. Black, 15th February, 1842, IV. *Shaw*, N. S. 743. The Appellant had no notice of the proceedings. Had he been duly apprized of them, he would have settled the matter at once, and prevented further expense. It is therefore unjust to saddle him with consequences which a proper line of conduct on the part of the Respondent would have averted.

II. The Lord Ordinary has rightly characterized the litigation which occasioned all this expense as unnecessary and "reckless." The execution was grossly blundered, and ought not to have been defended.

Mr. Rolt and *Mr. Anderson* for the Respondent.—I. The cases cited on the other side give no countenance to the Appellant's contention. On the contrary, they favour the Respondent. In particular, the conclusion to be derived from Clason v. Black is, that intimation or formal notice of the proceedings was not necessary in such a case as the present. Collier v. Wilson is still stronger to the same effect. And Fraser v. Andrew, when rightly understood, is an express authority in the Respondent's favour. In Allen v. Patterson, 17th June, 1663, *Morr.* 2088, a similar principle was enforced. There, a surety for an apprentice who had deserted his duty, resisted the master's demand for compensation, on the ground that intimation had not been served upon him. But the answer proved triumphant: "That there was nothing to oblige "him to make such intimation." Of what use would intimation have been in the present case? The Appellant, when actually served with notice, did nothing to compose matters. He kept aloof. He refused to intervene; affected to forget his bond, and denied his liability. In Brock v. Kemp, 20th February, 1844, VI. *New Series*, 709, it was decided that parties injured by the blunders of sheriffs' officers, are entitled to

full and complete relief as against their sureties, including all the consequential damages.

II. The defence of the execution was reasonable and proper. The Respondent was informed that there was no substantial objection to it. He was himself no lawyer, but an unlettered upholsterer, governed by the advice of his counsel. The expense he incurred, therefore, in maintaining the regularity of the execution, was incurred in good faith; and the Appellant is bound to make him compensation.

14th August, 1850.

LORD LANGDALE.—My Lords, in this case Lord Cottenham has communicated to me in writing his opinion; and, understanding that the noble Lord * who heard the case with him, concurs in the opinion he expresses, I will now read it to your Lordships:—

"This is a most important case. The original subject-matter "of dispute was a bill for 20*l.*, which has led to direct and in- "direct litigation for the last twenty-four years, the expenses "of which appear, independently of this appeal, to amount to "1,000*l.* and more. It is not easy to charge either party ex- "clusively with being the cause of so much evil, although the "loss must unfortunately fall upon one, perhaps the least guilty "of any.

"The Appellant became surety for Baird, a sheriff's officer, "who having been entrusted with the execution of process upon "a bill for 20*l.* against M'Closkie, the acceptor, by the Res- "pondent Struthers, committed a gross blunder which rendered

* From the Journals it appears that Lord Campbell, as well as Lord Brougham, heard the argument in this case on the 1st, 5th, and 6th March, 1849. At the date of the above judgment, however, Lord Campbell was on circuit; and it is probable that "the noble Lord" referred to by Lord Langdale, as concurring in the opinion of Lord Cottenham, was Lord Brougham.

" the process unavailing, and led to suits by M'Closkie for sus-
" pension, interdict, and damage, to which Struthers and Baird
" were Defenders. An issue was directed, which was twice
" tried, and led ultimately to a verdict for nominal damages;
" but M'Closkie was held to be entitled to expenses.

" Before the trial of the issue, Baird died (in September,
" 1837), and an attempt was made to substitute his repre-
" sentatives, but those parties having renounced, his interest
" was not represented. But after the second trial, that is in
" July, 1840, an intimation was made to the Appellant, as a
" surety, of the proceedings, and calling upon him to relieve the
" pursuer of all damages and expenses incurred. In answer to
" which he did not admit that he had become security, and de-
" clined interfering. Struthers having been compelled to pay
" M'Closkie's expenses, and having also incurred his own, pro-
" ceeded against the Appellant Dykes as surety for the ex-
" penses so incurred, and the repayment of these expenses;
" and the principal interlocutors appealed from are those of the
" Lord Ordinary of 12th February, 1847, and of the Second
" Division of the Court, of the 24th June, 1847, which have
" held that he is entitled to what was so claimed, with some
" deductions, which will be presently observed upon.

" It must be assumed upon the weight of authority, and
" particularly from the case of Clason *v.* Black, that by the
" law of Scotland, a surety in the situation of the Appellant is
" liable for injury sustained from the conduct of his principal,
" and from the expenses thereby occasioned, although no inti-
" mation was made to him of the proceedings from which such
" expenses arose; but such liability would be limited to ex-
" penses necessarily or properly incurred; and the surety is
" therefore entitled in proceedings against him to examine into,
" and question the necessity and propriety of such expenses.
" Upon this ground, the Lord Ordinary found the Appellant

" liable to the expenses generally prior to the renunciation of " the representatives of Baird, with some exceptions arising " from the nature of the expenses, but not liable for the sub- " sequent expenses. The Second Division of the Court of " Session, however, did not support this limitation of responsi- " bility; but held the Appellant liable to the expenses, sub- " sequent as well as prior to the 7th December, 1838, with the " exception of the expenses of the first trial, as they found that " Struthers ought, in point of prudence, to have made intima- " tion to the surety, and as the first trial had proved unavailing " to the ultimate result of the cause. Now in that first trial, " the jury had found a verdict for Struthers and against " M'Closkie, and in the second, a verdict for M'Closkie and " against Struthers, with one shilling damages. If Struthers " be entitled to the expenses of this contest with M'Closkie, it " does not appear why, fighting the battle of the officer and " his surety as well as of himself, he ought to be deprived of " his indemnity as to that portion of the contest in which he " was successful; but as that distinction is not complained of " in the present appeal, no final opinion is called for upon that " point; and the same observation applies to the other matters " in respect of which the interlocutors as they stand relieve the " Appellant from responsibility.

" All the judges recognize the rule as settled, or rather ap- " proved, in the case of Clason *v.* Black. But the difficulty " they appear to have felt arose from the death of Baird pen- " ding the litigation with M'Closkie (in which the expenses, " particularly as to the period between the date of the renun- " ciation of his representatives, and the intimation to the Ap- " pellant), were granted, with the exception of the first trial. " After Baird's death, his interest certainly was not repre- " sented, though after the intimation, the Appellant might, had " he chosen, have been sisted in his place; but it is not con-

" tended that Struthers, if liable to M'Closkie for the error " committed in the suit instituted by him (and the result of the " trials proves that he was so liable), would not have been en- " titled to compensation and indemnity as against the officer " who had committed the error, because M'Closkie had pro- " ceeded against him alone, not making the officer a party, as " in Clason *v.* Black, and Brock *v.* Kemp; but in fact, the " officer was made a party, and after his death, everything pos- " sible was done to substitute his representatives in his place.

" The error from which the expenses arose, was complete in " the lifetime of the officer. The surety, therefore, was liable " for the consequences of it, and the object of the present suit " is to enforce his responsibility. The utmost benefit which " the surety can derive from the officer's interest not having " been represented, would be the right to question the neces- " sity and propriety of the expenses; that is, to contend that " the damages sustained had not necessarily or properly arisen " from the act of the officer. And of this right he has had the " benefit by the interlocutors appealed from. It appears to me " that they go quite as far as was justifiable in relieving the " Appellant from portions of the expenses; and I cannot find " in that portion which remains, any part as to which it can be " said with truth, that it was recklessly or improperly incurred. " When the Appellant declined to interfere, and denied his " liability, he made it necessary for the Respondent so to con- " duct his case as to be able at the proper time to negative " such defence. The other interlocutors appealed from are im- " material in the view I take of this case, and do not therefore " call for any particular observation.

" Much as it is to be regretted that a liability which might " originally have been met by a payment of something more " than 20*l.*, should have been increased by litigation to the sum " for which the Appellant must now be held liable, I cannot see

" any ground for relieving him from any part of the liability to " which the interlocutors subject him, and regret to be under " the necessity of proposing that the expenses of this appeal be " added to such loss. The interlocutors appealed from ought, " I think, to be affirmed, with costs."

*Interlocutors affirmed, with costs.**

JAS. DODDS—THOS. DEANS, Agents.

* The above case is reported very fully in the Court of Session Decisions, Second Series; and will be found under the dates 14th February, 1845, 16th June, 1846, 7th July, 1847, and 10th February, 1848.

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